Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

PETER A. DORAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, AND WENDY E. SAUNDERS, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, PETITIONERS

*v.*

MASSACHUSETTS TURNPIKE AUTHORITY, MATTHEW AMORELLO, CHRISTY MIHOS, AND JORDAN LEVY

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

Whether the Fast Lane Discount Program ("FLDP") enacted by the Massachusetts Turnpike Authority ("MTA") which provides discounts based upon participation in the state-sponsored program and frequent travel within the state violates the dormant Commerce Clause of the United States Constitution because:

1. It imposes a non-uniform, non-compensatory and unfair user fee for identical use not calibrated to actual miles traveled or highway usage;

2. It discriminates in its practical effect because a) by requiring participation in a state-sponsored program and frequent travel on toll roads located within the state it offers a nominal privilege of participation that is far more valuable to local interests than to interstate travelers, guaranteeing that the vast majority of participants are Massachusetts residents, b) the MTA intended to and has in fact economically benefited Massachusetts residents, and c) it results in an impermissible subsidy to one of the groups hurt by the toll increase; accordingly, it imposes substantially higher and a disproportionate share of the state's highway costs onto non-residents thereby economically benefiting in-state interests to the detriment of out-of-state interests;

3. It fails to advance a legitimate local interest unrelated to economic protectionism because a) making it cheaper for frequent users (primarily

residents) of toll roads located in the state, and b) restructuring the toll burdens among local residents which fails to achieve its intended effect are economic interests; and

4. The financial burden imposed on out-of-state interests is excessive in relation to the local interest.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App. A) is reported at *Doran v. Massachusetts Turnpike Auth.*, 348 F.3d 315 (1st Cir. 2003). The order denying the petition for rehearing *en banc* before the First Circuit (App. B) is unreported. The judgment of the United States District Court for the District of Massachusetts (App. C) is reported at *Doran v. Massachusetts Turnpike Auth.*, 256 F.Supp.2d 48 (D. Mass. 2003).

## JURISDICTION

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 as the claims arise under the United States Constitution, Article I, § 8, cl. 3 and 42 U.S.C. § 1983 *et seq.* The First Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, as it was an appeal from a final judgment entered in the United States District Court for the District of Massachusetts. The final judgment was entered on January 24, 2003, and appellants filed a timely Notice of Appeal on February 12, 2003 pursuant to 28 U.S.C. § 2107(a). The final judgment disposed of all the appellants' claims dismissing the amended complaint ("FAC") under Fed. R. Civ. Proc. 12(b)(6) in its entirety. The judgment of the First Circuit entered on November 6, 2003 affirmed the dismissal of the amended complaint. Petitioners filed a timely petition

for rehearing and rehearing *en banc* on November 20, 2003. On December 15, 2003, the First Circuit denied the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and pursuant to United States Supreme Court Rule 10(c).

## RELEVANT PROVISIONS

This case involves a challenge to the validity of state statutes under the Commerce Clause. U.S. Const. Art. I, § 8, cl. 3. Petitioners brought this action to enjoin defendants from enforcing the act of the Massachusetts Turnpike Authority ("MTA") effective July 1, 2002, which granted to participants in the Commonwealth's FASTLANE electronic toll collection system a discount on certain interstate highway and tunnel tolls based upon participation in the state-sponsored program and frequent use of highways located within the Commonwealth. The relevant Massachusetts statues are set forth in Appendix E.

## STATEMENT

Appellants challenge the Fast Lane Discount Program ("FLDP") because i) it charges non-participants in the program (primarily interstate travelers) a higher cost-per-mile than participants (primarily residents) for identical use making it a non-uniform and non-compensatory user fee not calibrated to actual miles traveled, ii) it has a discriminatory impact because local interests make substantially greater use of such discount programs and travel more frequently on local roads, than non-residents, iii) its political genesis has a discriminatory intent to benefit local interests, iv) it fails to advance any legitimate local interest unrelated to economic

protectionism, and v) the individual and cumulative effects on interstate commerce by shifting a disproportionate share of highway costs to non-residents unrelated to actual use are excessive.

The discount program is simply a means to subsidize heavy users of the highways located within the state (*e.g.* local commuters) shielding them from the full impact of self-imposed toll increases under the pretext of offering the option to participate to interstate travelers. The practical operation of the user fee system does not achieve equal treatment for all travelers. Rather, it inherently favors in-state interests and serves only to shift an additional financial burden upon interstate commerce while making it cheaper for residents to use the same highways. The protectionist nature of this program is evident and cannot be ignored i) barely 1% of all participants are non-residents whereas 99% are Massachusetts residents, and ii) the MTA initially adopted a resident-only program and removed the residency requirement only after public discussion challenged its blatant unconstitutionality. Contrary to the First Circuit's reasoning, the incentive to participate or "frequency calculus," which turns on whether one is a frequent traveler on in-state toll roads, does not affect interstate travelers in precisely the same way as residents. Nor does this justification lessen the program's failure to assess tolls uniformly and fairly based on actual use.

The inescapable fact is that the distance traveled *per use* is identical regardless of participant status, frequency of use, or residency. Non-participants and infrequent users (primarily interstate travelers) necessarily receive no greater value, use identical services, travel the same distance, and cause the same "wear and tear" *per trip*. Yet, they pay a higher toll and

higher cost-per-mile for identical use. Conversely, frequent users (primarily residents) cause a greater percentage of the total wear and tear. Yet, they pay less per use. Because the tolls do not vary directly with the miles traveled, heavy users do not pay their fair share of the "wear and tear" (*i.e.* the costs to maintain the highway) caused by their frequent use. Frequency of use and participant status also fail to have any correlation to the degree wear and tear to justify the discounted fee making the FLDP an invalid user fee. Nothing in *Evansville–Vanderburgh Airport Auth. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972) relied on by the First Circuit allows states to reward frequent travelers making it cheaper for them for using the channels of interstate commerce located within their state more often.

Next, despite its apparent facial neutrality by offering the same nominal privilege of participation to all travelers regardless of residency, the FLDP has a discriminatory impact because residents will invariably participate in such programs in greater numbers than non-residents *and* because it charges non-residents a higher cost-per-mile for identical use. *American Trucking Ass'ns v. Scheiner*, 483 U.S. 266 (1987). Local interests will travel more frequently on highways within their home state, and participate in state-sponsored programs more often than non-residents simply because they live and work in the forum state. Even if non-residents participated, it is unlikely they would meet the frequency threshold (80 roundtrips per year) to qualify for the discounts, or recover the cost of the investment in the program. Thus, the incentive to participate does not affect interstate vehicles in precisely the same way as residents. Rather, the frequency calculus used to justify the FLDP has a discriminatory impact. It assures participation by residents while ensuring that non-

residents who by the intermittent nature of interstate travel will be infrequent users and therefore non-participants.

Finally, the FLDP lacks any legitimate local interest unrelated to economic protectionism and shifts a disproportionate share of the highway costs onto non-residents. The public benefit advanced by the MTA of achieving a more equitable sharing among residents of their self-imposed toll burden and making in-state roads cheaper for frequent users are, as acknowledged by the court, economic interests. Hence, they cannot serve as legitimate local interests. Furtner, the primary justification that the increased toll burden is redistributed among commuters is a fallacy. It fails to achieve its redistributive result because those commuting into Boston using alternate routes, (*e.g.* Interstate 93) from the north and the south still pay no tolls. The FLDP simply lowers the fee for participants and further subsidizes the discount for frequent users through fuel subsidies and asset sales. Thus, it merely shifts the additional toll burden to interstate travelers who are non-participants and infrequent users.

## A. The Fast Lane Discount Program

The MTA is a quasi-public, financially independent state agency charged with the construction and maintenance of a turnpike connecting Boston to the Berkshires ("I-90" or the "Turnpike"), and the Ted Williams and Sumner Tunnels. The MTA raises funds largely through tolls levied on users of its highways.

In March 1997, the Metropolitan Highway Systems bill authorized a uniform toll increase at the Allston-Brighton and Route 128 toll plazas from $.50 to $1, and at the Ted Williams and Sumner Tunnels from $2 to $3.

App. 6a. The revenue would pay for bonds issued to finance the Central Artery/Third Harbor Tunnel Project, commonly known as the "Big Dig." App. 6a. The MTA is responsible to generate through tolls approximately $1.5 billion of the nearly $6 billion to complete work of the I-90 section. App. 6a. The toll increases were scheduled to go into effect on January 1, 2002. App. 6a.

Toll policy has become politically charged splitting local interests, including commuter activists who sought to eliminate or shift the toll burden off their communities. Strong and sustained public opposition to the toll hikes from commuters in the western suburbs who complain that they are being unfairly forced to pay a larger share of Big Dig costs than other commuters has led lawmakers to seek possible funding alternatives, including restoring certain tolls. App. 6a, 26a, 69a. The political pressure forced the MTA to delay the toll hikes and implement a resident-only program discounting the toll increase by 50% for state residents who drive passenger cars equipped with the MTA's FASTLANE electronic toll collection system. App. 6a, 26a-27a. Subscribers would save $.25 at the highway toll plazas, and $.50 at the tunnels (the "Resident Only Fast Lane Discount Program"). App. 6a, 27a.

On July 1, 2002, the Resident Only Fast Lane Discount Program went into effect. Immediately thereafter, the Boston Globe on July 3, 2002 publicized concerns about the program's constitutionality under the dormant Commerce Clause. App. 7a, 52a-53a. On July 3, 2002, to mask the discriminatory nature of the resident-only program, the MTA eliminated the residency requirement by offering the privilege of participation to non-residents. App. 7a, 52a-53a. Under the revised program (the "Fast Lane Discount Program" or "FLDP"), the discounts remained the same, the minimum cost to

open an account is $47.50 (the cost of the transponder plus a $20 opening balance), and non-participants, including E-ZPass customers, do not receive a discount. App. 7a. Defendant Matthew Amorello observed the change would affect only a few thousand drivers, mostly from Connecticut. App. 7a, 53a. Thus, the MTA admits that only 1% of the FLDP participants are non-residents (only a few thousand non-residents participate of 320,501 transponders issued). App. 7a, 58a.[1]

Interstate travelers pay a substantial portion of the tolls used to maintain the Turnpike with over 10 million visitors traveling to the Greater Boston area by car for business or tourism each year. App. 73a-77a; *see Massachusetts Travel Industry Report: 2002* (App. F).[2]

## B. The Proceedings Below

The subject of this appeal is the judgment of the First Circuit affirming the judgment of the District Court dismissing the amended complaint filed July 29, 2002 (App. D).

***The District Court*** - The District Court first concluded that the FLDP is facially neutral which draws

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1 Non-participants pay the additional $.25 and $.50 at the toll plazas and tunnels. This corresponds to an out-of-state toll premium of 33% and 20% for using the same stretch of road ($.25 / $.75 = 33%, $.50 / $2.50 = 20%), respectively.

2 Because they come from various parts of the United States, including California, Pennsylvania, New York and New Jersey, they do not participate or travel frequently enough on in-state roads to qualify for the discounts. As a result, they pay at least $5 million more for identical use than participants (10 million travelers * $.50 for a roundtrip on I-90).

a distinction between participants and non-participants, not between residents and out-of-staters. App. 33a. Next, while acknowledging the discriminatory impact and the apparent subsidy to residents, the court, tempered by its complete discrimination principle, sidestepped the discriminatory impact reasoning that the program merely "confronts would-be subscribers with an *economic decision*" to participate to obtain the discounts. App. 34a-35a (emphasis added).[3]

The crux of the economic decision argument is that one's decision to participate turns on the frequency with which one is present within the forum state and utilizes its toll roads. Embracing the FLDP's facially neutral participant versus non-participant distinction, the court concluded that because out-of-state drivers can subscribe to the FLDP and "nothing precludes out-of-staters" from driving frequently on Massachusetts roads, the program did not have a discriminatory effect. App. 34a-35a. In this manner, the court justified the evident discriminatory impact as merely an economic decision to participate treating residents and non-residents equally.[4]

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3 This Court, however, has not required complete discrimination as the standard for practical effect discrimination. *See, e.g., Scheiner*, 483 U.S. at 284, 286 (imposing a higher cost-per-mile on a "major portion" of out-of-state carriers is "unquestionably discriminatory" in its "impact" because the privilege is several times more valuable to local carriers, regardless of whether some out-of-state carriers may lower their cost-per-mile in the forum state by driving more frequently than resident carriers).

4 The discriminatory impact is clear, but ignored: non-residents are "less likely to pay Massachusetts tolls regularly enough to make a FAST LANE membership profitable." App. 38a. "[R]esidents will almost certainly benefit from the discount program in greater numbers" than non-residents to get the ensuing discounts. App. 38a, 42a.

Relying on *Evansville* and *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), the District Court recognized that the FLDP is not directly related to use and ignored the uniformity requirement stating, "the toll scheme is more loosely tailored to measured use than it might otherwise be." App. 40a. In the court's view, *Evansville's* survey of the case law concerning highway tolls coupled with *Brice's* reasonable user fee standard allowed it to conclude, "that a scheme that levies tolls according to some *rational measurement* of drivers' use of the highways will not burden interstate commerce." App. 40a-42a (emphasis added). The court noted that the highway toll scheme while "profitable only to frequent users ... [t]he toll is still assessed on a per-use basis, but frequent drivers enjoy a *lower* per use rate because they travel the toll roads *more often*." App. 40a (emphasis in the original). "The layering of discounts not directly correlated with use on top of this scheme does not, under *Brice*, make it unconstitutional." App. 42a. In doing so, the court misapplies the user fee standard, including *Evansville*, by creating different measures for identical use and justifying the lower fee for heavy users by relying on *Brice's* reasonable standard which has been overruled by *Scheiner*. *See infra*.

Turning to *Pike's* balancing test, the court determined that the FLDP did not impose an excessive burden, despite its "subsidy to frequent travelers," in relation to the local benefits advanced by the MTA. *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970); App. 43a. Without citation, the court found that the state had a legitimate local interest to i) "reward repeated and regular use by all drivers of the roads that feed into the stream of commerce," ii) make "use of these roads cheaper," and iii) redistribute the toll increases among Massachusetts residents resulting in a "more equitable

distribution of the toll burdens that support its highway projects, including the Big Dig." App. 43a-44a. These interests, however, are economic interests that inherently disfavor interstate commerce and are not legitimate local interests even under *Pike*. *See infra*.

***The First Circuit*** - The decision of the First Circuit affirmed the District Court's reasoning that the FLDP was i) a valid user fee, ii) did not discriminate in its practical effect, iii) did not have a discriminatory intent or purpose, and iv) advanced a legitimate local interest unrelated to economic protectionism that did not excessively burden interstate commerce.

Addressing whether the FLDP is a non-uniform non-compensatory user fee, that does not charge every user the same amount for identical use, the court found appellants' "argument factually flawed" and flatly rejected the applicability of *Scheiner*, including its requirement that a user fee must be calibrated to actual miles traveled. App. 10a.[5] The First Circuit also embraced the facial neutrality of the FLDP and characterized the discriminatory impact as nothing more than an economic decision to participate which "turns on one's anticipated frequency of use" of toll roads located within the state. App. 11a. The "frequency calculus creates no resident versus nonresident classification." App. 11a. Rather, "[t]he FLDP is available on identical terms to drivers without regard to their residence; .... and participation is open to anyone." App. 11a. The court summarily dismissed the fact that the FLDP "charg[es] millions of non-residents a higher cost per mile for traveling the exact same distance" as "pure fiction. The

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5 In its decision, the court appears to confuse user fee and discriminatory impact analysis.

toll is higher for nonparticipants than for participants, regardless of where they live." App. 11a. In doing so, it ignored the discriminatory impact brought about by the frequency calculus rejecting the notion that interstate travelers invariably will be infrequent users. App. 11a.[6]

It then dismissed *Scheiner* as irrelevant. App. 12a. The First Circuit stated that the FLDP bore "no resemblance" to the unapportioned flat tax in *Scheiner*. App. 13a. Despite the discriminatory impact and *Scheiner's* recognition that residents will make substantially greater user of roads located within their state (a reality rejected by the District Court and First Circuit), in the court's view, the incentive to participate "affects local and out-of-state vehicles in precisely the same way."[7] App. 13a. Like the District Court, the First Circuit then found the FLDP to be a valid user fee more akin to *Evansville* and *Brice*. App. 14a. *Evansville* does not support this conclusion, notwithstanding the court's claim that the fee is use based and "proportional" to that use, and *Scheiner* overruled *Brice*. App. 13a.

*Scheiner*, citing to Justice Frankfurter's dissent in *Brice*, illuminated the reason why user fees must be based on "actual" road use and why nominal privileges, like the FLDP and the flat tax which require frequent use in the forum state to obtain the benefit, necessarily have a

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6 The First Circuit acknowledged that it is "likely" interstate travelers would be infrequent users, but reasoned that because many *residents* also may be infrequent users, the program did not treat interstate travelers differently. App. 11a, 15a-16a. The Commerce Clause, however, is concerned with the impact on interstate commerce.

7 The First Circuit's quote from *Scheiner*, 483 U.S. at 283 n. 15, is misplaced. *Scheiner* holds that a user fee for services provided by the state must be calibrated to actual miles traveled in the state or some other proxy for value and uniformly assessed.

discriminatory impact. *Scheiner*, 483 U.S. at 291. Like the flat tax, the FLDP is theoretically the same, but the "incentive to participate" or option to travel frequently on in-state highways due to the infrequent nature of interstate travel does not affect residents and interstate travelers in "precisely the same way." Rather, participation and frequency of use programs inherently have a discriminatory impact because the offer of frequent in-state travel to obtain the benefit is not as valuable to interstate travelers. *Id.*

While acknowledging the benefit to local residents, it reasoned, that not only is the incremental burden "de minimis ...*it is expected that nonparticipants will pay higher tolls* but it does not follow that interstate commerce will be burdened, must less that it will suffer discrimination." App. 16a. (emphasis added). The court reasoned, "the collection of an undiscounted toll from the occasional traveler – resident or nonresident – results in no discernable 'cost exporting.'" App. 16a.

This peculiar reasoning focusing on the individual burden is not supportable in light of *Scheiner's* discriminatory impact analysis, and the fact ignored by the court that over 10 million interstate travelers visit Greater Boston each year, do not participate in the FLDP, and pay the undiscounted toll premium. The additional amount paid by interstate travelers totals over $5 million per year. *See supra* n. 2. Any disparity in the treatment of in-state and out-of-state interests – whether business, users, or products – constitutes discrimination, even if the disparity is slight. *See* Tribe, *American Constitutional Law*, § 6-6, fn. 4, 5 (3ed 2000); s*ee also*, *Oregon Waste Systems, Inc. v. Environmental*, 511 U.S. 93 (1994) (finding that a $2.25 per ton surcharge for out-of-state waste to be discriminatory. The Court rejected the dissents assertion that the amount was insignificant

because it amounted to an increase of only 14 cents per week for the average user, *id.* at 109).

Addressing the program's discriminatory intent and purpose, the First Circuit found that commuters' political pressure seeking to limit their toll burden was a "constitutionally valid purpose." App. 16a. The court rejected that i) this political pressure resulted in the adoption of the resident-only discount program, ii) the legislative materials demonstrated that commuters were the intended beneficiaries, and iii) the manipulation of this program lead to the adoption of the FLDP as a pretext to accomplish indirectly what it could not do directly. Further, it rejected appellants' claim that the political pressure to reduce residents' toll burden resulted in an impermissible subsidy to the group hurt by the tax in violation of *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994); *see also* App. 16a (The MTA using fuel tax subsidies and asset sales to subsidize the discounts).

Turning to *Pike*, the First Circuit, like the District Court declared that any burden on interstate commerce was de minimis in "relation to the public benefits of achieving a more equitable sharing of toll burdens among commuters, some of whom pay no tolls on their routes, and facilitating the implementation of an essential funding scheme for major highway improvement." App. 18a-19a.

## REASONS FOR GRANTING THE WRIT

The First Circuit effectively announces a new rule of law that represents a dramatic departure from user fee and discriminatory impact analysis under the Commerce Clause. If allowed to stand, it permits states to i) impose higher fees on the channels of interstate commerce for identical use that fall more heavily on interstate travelers

under the pretext of equal participation, ii) avoid discriminatory impact analysis by extending the same nominal privilege of participation or frequency of use to non-residents, and iii) use economic protectionism as a legitimate local interest.

### A. The Decision Conflicts With User Fee Analysis.

The Supreme Court has drawn a distinction between user fees and general revenue taxes. User fees are collected by the state as reimbursement for the use or costs incurred in providing specific quantifiable services of state-owned or state-provided facilities. *Center for Auto Safety v. Athey*, 37 F.3d 139, 142 (4th Cir. 1994), *cert. denied*, 514 U.S. 1036 (1995); *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 n.12 (1981) (*quoting Clark v. Paul Gray, Inc.*, 306 U.S. 583, 599 (1939); *Ingels v. Morf*, 300 U.S. 290, 296-297 (1937)); *Massachusetts v. United States*, 435 U.S. 444, 462 (1978).

With respect to highway tolls, user fees are "valid only if the charge is compensatory [and] necessarily predicated upon the [actual] use made, or to be made, of the highways of the state." *Interstate Transit, Inc. v. Lindsey*, 283 U.S. 183, 190 (1931); *Sprout v. South Bend*, 277 U.S. 163 (1928). Where the user fee "*does not rise with an increase in mileage traveled ...or is unrelated to the degree of wear and tear,*" *there is "no sufficient relationship* between the measure employed and the extent or manner of [the] use to justify ... [the fee] as compensation for the use of the highways ..." *Id.* (emphasis added). *Scheiner* amplified user fee principles striking down an unapportioned flat tax similar to *Brice's* unapportioned 2% assessment on the fair market value of a vehicle requiring instead that the fee for highway use

be calibrated to actual use (*i.e.* the degree of wear and tear). A tax or toll must "*vary directly with miles traveled* or some other proxy for value received from the state." *Scheiner*, 483 U.S. at 290-1, 298 (emphasis added).[8]

This Court's decisions also have faithfully found that user fees on the channels of interstate commerce must be "uniform, fair and practical." *Evansville*, 405 U.S. at 715; *Hendrick v. State of Maryland*, 235 U.S. 610, 624 (1915).[9] The survey of highway user fees in *Evansville* revealed that the proper measures for assessing a toll were "based on a variety of measures of *actual use*, including ... *mileage within the State*, ..." *Evansville*, 405 U.S. at 715 (emphasis added). Nothing in *Evansville* allows a state to "lower" one's per-use rate and provide frequency discounts to travelers that use the airport services located within the state "more often" charging a different or non-uniform fee for identical use. App. 10a, 40a. Because the FLDP does not charge each user the same cost-per-mile for identical use, it fails the user fee and internal consistency tests independently of whether the fee is unreasonably large or unjustly

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8 *See also Guy v. Baltimore*, 100 U.S. 434, 441, 443 (1879) (finding that the city could either "permit the public wharves, which it owns, to be used without charge," *id.* at 442, or the city could "exact wharfage fees, *equally*, from all who use its improved wharves," *id.*) (emphasis added).

9 The Massachusetts Supreme Judicial Court has noted that *Scheiner*, which supersedes *Evansville*, adds a layer of analysis not previously articulated in cases addressing user fees. "A valid user fee will pass the internal consistency test ... *[where it] is directly related in purpose and amount*, to the use of a service or privilege." *American Trucking Ass'ns, Inc. v. Secretary of Admin.*, 415 Mass. 337, 348, 613 N.E.2d 95, 102 (1993) (rejecting the Commonwealth's claim that the internal consistency test does not apply to *Evansville* and user fees).

discriminatory. *Interstate Transit*, 283 U.S. at 190.

### a. There Is No Relationship Between Participation Or Frequency Of Use To Justify The Lower Fare.

The FLDP charging non-uniform fares as compensation for identical costs fails the user fee test because frequency of use or participant status fail to have any correlation to the degree of wear and tear to justify the lower fee. Thus, they are invalid proxies for determining the user fee and the discounted toll.

Here, vehicle class (size and weight) and actual miles traveled determine the degree of wear and tear for which the MTA may properly seek compensation. *Id.* There is no difference in the degree of wear and tear, the miles traveled, or the cost to the MTA caused by each use for participants or frequent travelers to justify a lower fare. Each use, frequent or infrequent, participant or non-participant, resident or non-resident is identical within the "passenger vehicle" class causing the same degree of wear and tear for which the MTA may recover the cost by assessing a uniform fee. Frequent users travel more often, but the cost-per-use is the same. The fact that the FLDP incorporates no distinction between residence and participation, and offers discounts to all who participate misapprehends that these factors do not affect the MTA's actual highway costs. App. 10a. The participant versus non-participant distinction and the frequency calculus, however, are directly applicable to discriminatory impact analysis.

The notion that the benefits of the FLDP accrue based on participation or frequency of use, and that frequent drivers receive greater benefits, but also pay a greater amount in tolls misapprehends the central

uniformity and cost recovery tenets of user fee analysis. App. 10a. Of course, frequent travelers pay more in tolls than infrequent travelers. This is because they make more trips, travel more miles, and utilize more often the services provided by the MTA. Because each use is the same and each toll is designed to be compensatory for one's use, each use must be assessed the same fee. There is no principled reason why frequent users who cause the same wear and tear per use, yet cause a greater percentage of the total wear and tear, should pay less than their fair share for their heavy use.

### b. The Decision Conflicts With *Scheiner*.

The First Circuit dismisses *Scheiner*, which found that each user must pay the same cost-per-mile, claiming the flat tax "bears no resemblance" to the discount program. It then finds inapplicable *Scheiner's* discussion wherein this Court rejected the same user fee analysis (including a version of the frequency calculus), and the economic restructuring of burdens arguments used to uphold the FLDP. App. 13a; *Scheiner*, 483 U.S. at 287-297. *Scheiner*, however, clearly rejected the unapportioned flat tax applying the user fee principles of *Evansville* finding that each user must pay the same cost-per-mile per use.

*Scheiner* disagreed with the Pennsylvania court's analysis of *Evansville* finding instead that flat highway taxes allowing unlimited trips are "wholly unlike the user fees ... upheld in *Evansville*" which assessed a flat $1 tax for each passenger per trip. *Scheiner*, 483 U.S. at 290-1. *Scheiner* recognized that flat taxes were not apportioned on actual use and in direct reference to the first prong of *Evansville* found that flat taxes "do not even purport to approximate fairly the cost or value of the use of

Pennsylvania's roads." *Id.* at 290-1.

*Scheiner* cited Justice Frankfurter's dissent in *Brice* in support of its holding that a user fee must be based on the "*relevant measure of actual road use [with] both interstate and intrastate carriers paying according to the facilities in fact provided by the state.*" *Id.* at 291 (emphasis added). *Scheiner* overruled *Brice* and clarified *Evansville* rejecting the flat tax because it was not calibrated to the actual miles traveled within the state, in addition to its discriminatory impact by charging a higher cost-per-mile. *Id.* at 291, 298 (O'Connor, dissenting and noting that *Scheiner* overrules *Brice*). Like the flat taxes which did not approximate the state's highway maintenance costs and did not uniformly compensate the state for actual miles traveled, frequency of use and membership in the FLDP do not even purport to approximate fairly the cost or value of the use of Massachusetts roads, nor does the FLDP uniformly charge based on actual miles traveled.

The First Circuit dismisses *Scheiner's* central rationale and overlooks the similarities between flat highway taxes and the FLDP's discounted tolls. Both fail the first prong of *Evansville*. Both are not apportioned on use. Both charge less and a lower cost-per-mile based on frequency of travel in the forum state. Both allow frequent travelers (primarily residents) to cause a greater percentage of the wear and tear for which they do not pay their fair share. Both have a discriminatory impact by offering a privilege far more valuable to local interests. Both cannot be justified claiming the fee is de minimis.

The user fee decisions make clear that the MTA can only recover the cost of providing the service in *direct proportion to the use of the facilities* based on the degree of wear and tear, or actual miles traveled. The degree of wear and tear, and the distance traveled are identical

requiring the fee to be the same. The option to participate or travel frequently to obtain discounts does not impact this analysis.

### c. The Decision Conflicts With *Evansville*.

A user fee must be uniform and i) reflect a fair, if imperfect approximation of the cost of using state facilities, ii) not discriminate against interstate commerce, and iii) not be excessive in relation to the costs incurred by the taxing authority. *Evansville*, 405 U.S. at 715-720. The first prong of *Evansville*, allows the MTA to recover the cost of the service it provides based on some measure of wear and tear by charging a uniform fee per use. *Id.* It does not allow for the creation of participant classes charging them lower non-uniform fees for identical, but frequent use.

*Evansville* charged a uniform $1 fee for each identical use to recover the cost of that use. *Id.* Nothing in *Evansville* by itself or as modified by *Scheiner* allows frequent flyers using the same airport services more often, like frequent users of highway services, to pay a discounted fare (*i.e.* paying less than the $1 estimated cost per use) for using the same services more often. Rather, *Evansville* focused on collecting a uniform $1 fee from each traveler to compensate for the cost of each trip. *Id.*; *Scheiner*, 483 U.S. at 290. Unlike *Evansville*, the FLDP charges two different fees for the same trip (*e.g.* $.75 for participants and $1 for non-participants). *Evansville* is constitutional because the uniform, non-discriminatory fee is designed to recover the cost *per use*, regardless of whether its impact falls more heavily on interstate travel. The FLDP is not constitutional because the discount is non-uniform, is not calibrated to actual use, and has a discriminatory impact. Rather, it is arbitrary, politically

created, based on participation and frequent use, and unrelated to the degree of wear and tear.

The MTA's cost recovery system, however, combining discounts and full tolls for identical use has resulted in a financial deficit situation because toll revenues are insufficient to cover the costs of maintaining the highway that has required the MTA to find alternate sources of revenue to subsidize the discounted fare through earmarking fuel taxes and asset sales. App. 72a; *see also* Boston Globe, *Officials try to stall land sale to Harvard*, (Thursday April 3, 2003) (Turnpike officials commenting that the money from the sale would go toward keeping the discount program for FASTLANE participants). Under the first prong of *Evansville* the fuel taxes and asset sales should benefit all travelers by lowering user fees, but result in an impermissible subsidy to those hurt by the toll increase (*i.e.* frequent travelers or commuters who account for 99% of the FLDP participants) in violation of *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186 (1994) (a neutral tax coupled with a subsidy to one of its groups hurt by the tax violates the Commerce Clause). *See infra.*

### B. The Discriminatory Impact Cannot Be Justified Using The Frequency Calculus.

The FLDP discriminates in its practical effect by charging a different cost-per-mile for identical use and disproportionately benefiting in-state interests. Yet the court justifies the discriminatory impact by employing the frequency calculus. The purported neutrality of the frequency calculus, including the transparency of the First Circuit's "geographic reality" rationalization, is a fallacy that cannot be reconciled with the facts or the law. The MTA admits that no one other than a few thousand

residents from Connecticut participates – barely 1% of participants are non-residents. App. 7a, 11a. Thus, the incentive to participate as illuminated by *Scheiner* by offering frequent travel on local roads though theoretically the same does not treat non-residents equally. Residents will invariably participate in these programs in greater numbers than non-residents resulting in a discriminatory impact. Consequently, it is not to be "expected" nor is it constitutional that non-participant infrequent travelers will pay higher tolls for infrequent but identical use. App. 16a. Rather, those local interests that use the service more often and cause a greater percentage of the wear and tear should pay their fair share, not shift the burden to others.

The conceptual basis of the frequency calculus, like the flat tax, is that one who receives a facially neutral privilege without limit is not wronged by his own refusal to use it as freely as he may. *Scheiner*, 483 U.S. at 293 *citing Aero Mayflower Transit Co. v. Georgia Public Service Comm'n*, 295 U.S. 285, 289 (1935). In fact, the Pennsylvania court's reasoning rejected by *Scheiner* is strikingly similar to the District Court's analysis adopted by the First Circuit. The Supreme Court of Pennsylvania relying on *Evansville* reasoned that, "the flat tax applied equally on all vehicles using the State's highways" despite its imposition of a greater cost-per-mile. *Scheiner*, 483 U.S. at 279. The court reasoned that the flat fee is not manifestly disproportionate to the services rendered, and interstate travelers "*are free to use the Commonwealth's highways as often and for whatever distances they wish.*" *Id.* (emphasis added).

The District Court's formulation also relying on *Evansville* and *Brice* is substantively no different: "*nothing ... precludes out-of-staters from driving the Massachusetts toll roads with that frequency.*" App. 34a-

35a (emphasis added). The First Circuit's "frequency calculus" is the same because the benefits turn on frequent travel in the forum state. Thus, in the court's view, non-residents are free to participate and use Massachusetts' highways as often as they wish to obtain the discount. App. 10a.

It is no longer appropriate, however, to uphold a user fee merely because the particular formula by which its charges are reckoned extends the same nominal privilege to interstate commerce that it extends to in-state commerce. *Id.* at 296. Such a program, like the FLDP, that is several times more valuable to local interests than to out-of-state interests is unquestionably discriminatory in its impact and offends the Commerce Clause. *Id.* at 293-296.

Similarly, the FLDP may not be upheld merely because it extends the same nominal privilege of participation and frequency of use to non-residents. It also does not matter that some non-residents like the ones from Connecticut here choose to participate in the FLDP, the discriminatory effect is the same. *Id.* at 284, 286; *see supra* n. 3. Massachusetts residents will frequently travel in-state roads more often than non-residents and participate in state sponsored programs more often than non-residents simply because they live and work here. Thus, the frequency calculus itself (*i.e.* incentive to participate) does not affect all residents and non-residents in exactly the same way. It has an unmistakable discriminatory impact and results in higher tolls for identical use. Accordingly, there is no constitutional basis for a transportation policy that benefits commuters burdened by self-imposed tolls by extending the same nominal privilege to non-residents.

### C. The FLDP Has A Discriminatory Intent.

The Supreme Court has established a virtually per se rule of invalidity, that applies where a state law discriminates against out-of-state economic "interests facially, in its practical effect, or *in its purpose.*" *Wyoming v. Oklahoma*, 502 U.S. 437, 454-455 (1992) (emphasis added). State laws motivated by an intent to discriminate against interstate commerce are subject to strict scrutiny. It is clear given the FLDP's genesis from political pressure to reduce commuter costs limiting their toll burden and adoption of the unconstitutional resident-only discount program that the MTA intend to and has benefited Massachusetts residents. App. 6a-7a, 69a. The fee structure itself by offering discounts for "roundtrips" and the legislative materials make clear that Massachusetts "commuters" are the intended beneficiaries. App. 63a, 65a-71a; *see* M.G.L. c. 246 §§ 44-6, 57 and M.G.L. c. 81A § 3 (demonstrating a clear intent to benefit commuters, analyzing the effect of toll hikes on local communities, and extending the discounts to the Tobin Bridge). The MTA's attempt to redraft the FLDP as evenhanded by removing the residency requirement and offering discounted tolls to those non-residents that participate knowing that few non-residents actually participate is a transparent attempt to ease the toll burden on suburban commuters and mask the discriminatory impact by offering a hollow option that it knows few non-residents will choose. App. 7a, 52a-53a, 56a.

The First Circuit summarily dismisses these allegations stating that the political pressure is constitutional. App. 16a. However, "[i]t is [the court's] duty to determine whether the statute under attack, whatever its name may be, will in its practical operation

work discrimination against interstate commerce." *West Lynn*, 512 U.S. at 201 *quoting Best & Co. v. Maxwell*, 311 U.S. 454, 455-456 (1940). Moreover, where a nondiscriminatory tax is coupled with a subsidy to one of the groups hurt by the tax, a state's political processes can no longer be relied upon to prevent legislative abuse, because in-state interests, which would otherwise continue to lobby against the toll increase have been mollified by the subsidy. *Id.* at 200. Here, the state's political process cannot be relied on to protect interstate interests because the discounts, fuel taxes and asset sales directly subsidize residents to the detriment of non-residents under the pretext of equal access. App. 68a, 69a, 72a.

### D. The Decision Conflicts With *Pike*.

The First Circuit upheld the FLDP under *Pike* maintaining that i) it treated residents and non-residents equally by offering them the same nominal privilege, ii) the MTA had a legitimate local interest in redistributing the toll burden and facilitating the implementation of an essential funding scheme, and iii) did not impose an excessive burden. App. 18a; *see Pike*, 397 U.S. at 142 (describing the balancing test). The decision conflicts with *Pike* because the FLDP does not serve a legitimate local interest unrelated to economic protectionism and the burden imposed is excessive.

First, the FLDP is an invalid user fee and discriminates in its practical effect. *See supra.* Second, easing or restructuring the toll burden on Massachusetts residents – clearly an economic interest – is not a legitimate local interest, especially where it fails to achieve its intended redistributive effect. *See, e.g., Dean Milk Co. v. City of Madison*, 340 U.S, 349, 354 (1951)

(legitimate interests include those to protect the health and safety of its people). As discussed above, commuters using alternate routes into Boston still pay no tolls; thus, the restructuring rationale is a sham independent of the fact that it is an economic interest. The FLDP simply lowers the fee for participants and shifts the additional toll burden primarily to interstate travelers who, due to the nature of interstate travel, are non-participants and infrequent users. The court's suggestion that the discount program facilitates the implementation of an essential funding scheme also is without merit. Appellants do not object to paying a toll for the services provided by the MTA only that the fee structure must be uniformly assessed based on actual use (*i.e.* miles traveled) and non-discriminatory in accordance with the Commerce Clause.

*Scheiner* specifically rejected the equitable redistribution of the toll burden argument as a legitimate local interest preventing states from equitably restructuring their self-imposed tax burden in a manner that shifts a disproportionate share of the costs to maintain the facility onto non-residents. *See Scheiner*, 483 U.S. at 288-9 (striking down the "rational restructuring of burdens" defense which "is based on the erroneous premise that relief for [in-state residents] is constitutionally permissible because they are subject to a higher financial burden for their use of [in-state roads]). The remedy for such a self-imposed tax lies in a change in their level or the collection of revenues through valid taxes. *Id.* Accordingly, the MTA is not allowed to address the disparate toll burdens on Massachusetts residents by enacting statutes that have the practical effect of shifting the toll burden onto non-residents while making it cheaper for commuters to use the same highways. Such a justification is an economic interest.

Third, balancing the harms resolves the burdens in plaintiffs' favor. As a preliminary matter, the court's analysis misapprehends the facts.[10] App. 18a. It is undisputed that the distance traveled on I-90 and usage of the tunnels is identical. App. 6a. The First Circuit ignores that non-participants (non-residents) pay a significant toll premium, 20% or 33% greater than residents for identical use, arguing that this amount for each *individual* traveler by necessity de minimis. App. 18a. This additional financial burden per transaction is hardly an insignificant sum. When multiplied by at least 10 million non-resident domestic motorists traveling through the relevant toll plazas each year, the financial burden on non-residents (at least $5 million per year) is clearly excessive in relationship to an economic state interest to redistribute the toll burden among its citizens that fails to achieve its intended effect. Even where the individual differential may seem small, the cumulative disparity is ample and cannot be brushed aside as incidental. *See supra Oregon Waste*, 511 U.S. at 109 (rejecting assertion that additional cost of 14 cents per week was de minimis).

Finally, for those non-residents that do participate, the $47.50 to acquire a transponder and maintain an account balance is an undue burden. To recoup the cost of the transponder alone requires 55 roundtrips to Boston on I-90 ($27.50 / $.50). Common sense dictates that few non-residents will ever travel this often, let alone pass the frequency threshold (80 roundtrips per year) to qualify for the discounts. At the same time, the minimum balance

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10 An interstate traveler from New York to Boston on I-90 pays two tolls, not one. App. 18a. The first toll pays for the trip from Exit 1 to Exit 15. This toll is not subject to the FLDP. The second toll, which is subject to the FLDP, pays for the 12-mile trip from Exit 15 into Boston. The relevant trips are identical.

of $10 acts as a non-interest bearing loan to the MTA. Whereas, the frequent in-state commuter making a roundtrip per day into the city recovers the transponder cost in approximately two months. Thus, the FLDP does not regulate even-handedly and imposes an excessive burden on interstate travelers.

### E. The Issue Presented Is Important.

The proceeding involves a question of national importance that requires the Court's immediate attention. Numerous states and transportation authorities across the nation faced with local opposition to increased tolls have implemented similar electronic toll discount programs on the channels of interstate commerce that charge different fees for identical use based solely on one's participation in the state-sponsored electronic toll collection system and/or frequent use of highways located within their state.[11] The dominant feature of all of them is the ability of heavy users to obtain markedly lower per-mile user fees making it cheaper for them to use the toll roads, tunnels and bridges located within the state.

As *Scheiner* and this case demonstrate, heavy frequent users in these programs are principally in-state

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11 These include, New York, New Jersey, Pennsylvania (E-ZPass, *see* www.ezpass.com), Massachusetts (FASTLANE), Maine (Transpass, *see* www.maineturnpike.com), California (FasTrak), Colorado (E-470 EXPress Toll), Florida (Sun Pass , EPass , LeeWay), Georgia (GA Cruise Card), Illinois (IPass), Kansas (KTag), Oklahoma (PikePass),Texas (Toll Tag), Virginia (Smart Tag). Although, some systems are interoperable with others (*e.g.* FASTLANE and E-ZPass), they generally do not offer discounts to participants in other systems.

residents producing an unavoidable and intended discriminatory impact.[12] The cumulative problem caused by widespread adoption of electronic toll collection discount programs results in significant cost exporting of highway costs to non-residents burdening interstate commerce. Interstate travelers are more than willing to shoulder their fair share to maintain the state's highways. They object, however, to the protectionist legislation reflected by the FLDP that accomplishes indirectly what it plainly cannot do directly, make it cheaper for in-state residents to pay less for identical use to cover the escalating cost of highway maintenance. Then justifying the higher fees and discriminatory impact because they are infrequent users claiming the additional amount exacted from the occasional interstate traveler is de minimis. The emerging pattern of utilizing electronic toll collection to benefit in-state residents makes the issue ripe for consideration by this Court.

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12 *See, e.g.*, San Francisco Chronicle, *$5 toll has drivers rushing to FasTrak*, (August 30, 2002) (after implementing a toll increase of $2 to cross the Golden Gate Bridge, more than 5,200 California residents signed up for FastTrak to get the $1 discount); Boston Globe, *Summer-only toll hike weighed for pike* (Friday March 5, 2004)

> Summer tourists [non-residents] who use Maine's highways would bear the brunt of a new toll plan under consideration by the Maine Turnpike Authority. Under the plan, one of four toll schemes under consideration, the turnpike would charge higher tolls during July and August.... Authority director Paul Violette said he's intrigued by the possibility of charging tourists more, but said the authority would not put the entire burden of its fare increases on people from out of state.

Maine, however, provides discounts to those participants in its Transpass system. *See* www.maineturnpike.com.

With the protectionist veil provided by the frequency calculus, states can impose numerous non-uniform and discriminatory user fees on the channels of interstate commerce that fall more heavily on interstate commerce simply by extending the privilege of participation or frequent use of facilities located within the state to non-residents. The prohibition against non-compensatory user fees unrelated to actual use and discriminatory impact analysis on the channels of interstate commerce exists to prevent states from exploiting their unique geographic advantages by adopting policies like the FLDP that result in a significant degree of permanent cost exporting. Absent such a prohibition, states would freely fix fees, as here, for the use of traffic corridors, airports and seaports within their borders and skew in favor of in-state interests every manner of commerce. Thus, nothing prevents the state from developing such programs for commercial interests, implementing discounted tipping fees for frequent users of waste and recycling facilities within their state, or extending discounts to other channels of interstate commerce.

Such frequent discount programs, as here, unduly burden interstate commerce by increasing operating costs on those commercial interests that operate in many states which may not travel often enough in any one state or make the necessary roundtrips to qualify for the frequency discount, versus those commercial interests that operate frequently in a single state. The true and intended practical effect of such programs is to redistribute the increased toll burden onto non-residents, thereby forcing non-residents with little or no incentive to participate to pay a disproportionate share of the state's highway costs.

The decision below validates these programs that

benefit in-state interests to the detriment of out-of-state interests. At the same time, it virtually eliminates whole bodies of well-established Commerce Clause jurisprudence under the pretext of equal access. It is imperative that this Court review and reverse that decision before states extend frequency and participant based discounts to all channels of interstate commerce and other aspects of interstate commerce.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Dated:March 15, 2004

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**Appendix A**

**United States Court of Appeals**
**For the First Circuit.**

Peter A. DORAN, individually and on behalf of all others similarly situated; Wendy E. Saunders; individually and on behalf of all others similarly situated,

Plaintiffs, Appellants,

v.

MASSACHUSETTS TURNPIKE AUTHORITY; Matthew Amorello; Christy Mihos; Jordan Levy,
Defendants, Appellees.

No. 03-1312.

Heard Sept. 12, 2003.
Decided Nov. 6, 2003.

Residents of states neighboring Massachusetts brought § 1983 action against the Massachusetts Turnpike Authority (MTA) and its individual board members, alleging that the discounts offered by the MTA to subscribers to state toll booth program, but not to subscribers of comparable services offered in other states, violated the dormant commerce clause. The United States District Court for the District of Massachusetts, 256 F.Supp.2d 48, Nancy Gertner, J., dismissed action. Residents appealed. The Court of Appeals, Schwarzer, Senior District Judge, held that program did not violate dormant commerce clause.

Affirmed.

West Headnotes

[1] Commerce 12
83k12 Most Cited Cases

The commerce clause not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[2] Commerce 56
83k56 Most Cited Cases

The dormant commerce clause prohibits economic protectionism, that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[3] Commerce 74.5(2)
83k74.5(2) Most Cited Cases

[3] Turnpikes and Toll Roads 43
391k43 Most Cited Cases

State toll booth program offered by the Massachusetts Turnpike Authority (MTA), giving discounts to program subscribers but not to subscribers of comparable services offered in other states, did not impose nonuniform and noncompensatory user fee unrelated to actual use, for purpose of determining if program violated dormant commerce clause; program

was available on identical terms to drivers without regard to their residence, and benefits of program accrued based upon frequency of driver's use, as more frequent driver would receive greater amount of discounts by paying tolls more frequently. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] Commerce 74.5(2)
83k74.5(2) Most Cited Cases

As long as a state bases its highway tax on a relevant measure of actual road use, obviously both interstate and intrastate drivers pay according to the facilities in fact provided by the state, and the program places no undue burden on interstate commerce, and thus, does not implicate dormant commerce clause. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Commerce 74.5(2)
83k74.5(2) Most Cited Cases

[5] Turnpikes and Toll Roads 43
391k43 Most Cited Cases

State toll booth program offered by the Massachusetts Turnpike Authority (MTA), giving discounts to program subscribers but not to subscribers of comparable services offered in other states, was not discriminatory on its face or in its practical effect against interstate travelers, for purpose of determining if program violated dormant commerce clause; interstate travelers paid same tolls as resident travelers, program was available on same terms to both residents and non-residents of Massachusetts, tolls without discount were de minimis, and participation in

program did not preclude participation in other electronic toll collection systems. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[6] Commerce 74.5(2)
83k74.5(2) Most Cited Cases

[6] Turnpikes and Toll Roads 43
391k43 Most Cited Cases

State toll booth program offered by the Massachusetts Turnpike Authority (MTA), giving discounts to program subscribers but not to subscribers of comparable services offered in other states, served legitimate local interest of facilitating major highway improvements and its effects on interstate commerce were incidental, for purpose of determining if program violated dormant commerce clause; all participants in program were required to invest $27.50 to acquire a transponder and maintain an account balance of over $10, which was de minimis in relation to acquiring funding for highway improvements. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[7] Commerce 74.5(2)
83k74.5(2) Most Cited Cases

[7] Turnpikes and Toll Roads 43
391k43 Most Cited Cases

State toll booth program offered by the Massachusetts Turnpike Authority (MTA), giving discounts to program subscribers but not to subscribers of comparable services offered in other states, did not violate dormant commerce clause; program did not

impose nonuniform and noncompensatory user fee unrelated to actual use, program was not discriminatory on its face or in its practical effect against interstate travelers, program served legitimate local interest of facilitating major highway improvements, and its effects on interstate commerce were de minimis. U.S.C.A. Const. Art. 1, § 8, cl. 3.

*316 Stephen V. Saia was on brief for appellants.

Joshua M. Davis, with whom James A. Aloisi, Jr. and Peter N. Kochansky, was on brief for appellees.

Before TORRUELLA, Circuit Judge, HOWARD, Circuit Judge, and SCHWARZER, [FN*] Senior District Judge.

FN* Of the Northern District of California, sitting by designation.

SCHWARZER, Senior District Judge.

Peter A. Doran and Wendy E. Saunders brought this action under 42 U.S.C. § 1983 against the Massachusetts Turnpike Authority, its chairman and members of its board (collectively, "MTA"). Plaintiffs complain that the FAST LANE Discount Program ("FLDP" or "program") established by MTA violates the dormant Commerce *317 Clause of the United States Constitution. U.S. CONST. art. I, § 8, cl. 3. That program permits drivers of automobiles equipped with a transponder sold by MTA to pass through

certain toll plazas and tunnels in the Boston area for a discounted toll which is electronically collected. Plaintiffs contend that the program discriminates against nonresidents of Massachusetts and does not serve a legitimate local interest. The district court dismissed the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim on which relief can be granted. It held that the FLDP did not discriminate against out-of-state residents and did not excessively burden interstate commerce. The district court had jurisdiction under 28 U.S.C. § § 1331 and 1343, and we have jurisdiction under 28 U.S.C. § 1291. For the reasons discussed below, we affirm.

**FACTUAL AND PROCEDURAL HISTORY**

In March 1997 Massachusetts Governor William Weld signed the Metropolitan Highway Systems bill authorizing MTA to increase tolls at the Allston-Brighton and Route 128 toll plazas from $.50 to $1.00, and at the Ted Williams Tunnel and the Sumner Tunnel from $2.00 to $3.00. The revenue from these toll increases would help finance Boston's Central Artery/Third Harbor Tunnel Project, commonly known as the "Big Dig." That project aims to bury stretches of Interstate 93 beneath the city and extend Interstate 90 to Logan International Airport. MTA is responsible for generating through tolls approximately $1.5 billion of the nearly $6 billion needed to complete work on the Interstate 90 segment.

The toll increase was scheduled to go into effect on January 1, 2002. In response to public opposition, MTA postponed the increase and proposed to implement a Resident Only Discount Program, under

which state residents who drove automobiles equipped with FAST LANE transponders would receive toll discounts of $.25 at the Allston-Brighton and Route 128 toll plazas and $.50 at the tunnels.

The FAST LANE system allows vehicles equipped with a transponder to pass through toll plazas without having to stop and pay. Participants must purchase a transponder from MTA for $27.50. The transponder is a small plastic device attached to the windshield. It signals the car's identity to an MTA facility which automatically charges the toll to the driver's account. Drivers generally assign their account to their credit card which is billed $20 at the outset; thereafter, tolls are deducted until $10 remains, at which point an additional $10 is billed to replenish the account. Cars equipped with transponders used in other cities that--like the E-Z Pass system--are interoperable, may drive through FAST LANE toll gates without stopping, but do not receive discounts. [FN1]

FN1. E-Z Pass is the equivalent electronic toll payment system used by the State of New York.

Before the Resident Only Discount Program went into effect, a newspaper article questioned whether it violated the dormant Commerce Clause of the Constitution. In response, MTA modified the program to apply to all drivers of automobiles, resident or not, equipped with FAST LANE transponders. MTA's chairman noted that as a result a few thousand out-of-state FAST LANE subscribers, most of whom commute from Connecticut, would become eligible for

discounts.

*318 On July 4, 2002, plaintiff Doran drove through the Allston-Brighton and Route 128 toll plazas. Doran is a Vermont resident who did not subscribe to the FLDP, so he paid the full tolls. On July 5, plaintiff Saunders drove through the same toll plazas. She is a New York resident who had an E-Z Pass but no FAST LANE transponder, so she also paid the full tolls.

Doran and Saunders then filed this action alleging that MTA's discount system violates the dormant Commerce Clause, and moved for a preliminary injunction. Finding that the complaint failed to state a claim, the district court granted MTA's motion to dismiss.

**DISCUSSION**
**I. STANDARD OF REVIEW**

We review "the grant of a motion to dismiss de novo, taking the allegations in the complaint as true and making all reasonable inferences in favor of plaintiff." *Rockwell v. Cape Cod Hosp.*, 26 F.3d 254, 255 (1st Cir.1994). However, we are not required to accept legal conclusions. *New England Cleaning Servs. v. American Arbitration Ass'n*, 199 F.3d 542, 545 (1st Cir.1999). A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) should succeed only when "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegation." *Gorski v. New Hampshire Dep't of Corr.*, 290 F.3d 466, 473 (1st. Cir.2002) (*citing Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)).

## II. THE MERITS

[1][2] The Commerce Clause of the United States Constitution grants Congress the power to "regulate Commerce ... among the several States." U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause "not only grants Congress the authority to regulate commerce among the States, but also directly limits the power of the States to discriminate against interstate commerce." *New Energy Co. v. Limbach*, 486 U.S. 269, 273, 108 S.Ct. 1803, 100 L.Ed.2d 302 (1988). This "dormant" Commerce Clause "prohibits economic protectionism--that is, regulatory measures designed to benefit in-state economic interests by burdening out-of-state competitors." *Id.* We must decide whether plaintiffs have stated a claim that the FLDP offends the dormant Commerce Clause.

Plaintiffs advance four contentions in support of their claim:

1) That the FLDP imposes a nonuniform and noncompensatory user fee unrelated to actual highway usage;

2) That it is discriminatory on its face or in practical effect;

3) That it does not serve a legitimate local interest unrelated to economic protectionism; and

4) That its cumulative effects on commerce, by shifting highway costs to nonresidents, are excessive. Appellants' Br. at 9.

We address each of these contentions in turn. [FN2]

FN2. Because we find other arguments to fully support MTA's position, we do not address the market participant issue. MTA contends that the dormant Commerce Clause does not even apply to this case because of the market participant exception. *See Reeves, Inc. v. Stake*, 447 U.S. 429, 100 S.Ct. 2271, 65 L.Ed.2d 244 (1980).

**A. The FLDP Does Not Impose a Nonuniform and Noncompensatory User Fee**

[3] Plaintiffs argue that the FLDP violates the Commerce Clause because it does *319 not charge every user the same amount for identical use and because the discount is nonuniform, noncompensatory and unrelated to actual highway usage or to specific services provided by MTA. To begin with, the argument is factually flawed. The FLDP is available on identical terms to drivers without regard to their residence; the program incorporates no distinctions or classifications based on residence and participation is open to anyone. The benefits of the discount program accrue simply on account of a driver's frequency of use. The frequent driver will receive a greater amount of discounts than the infrequent driver, but he or she will, of course, also pay a correspondingly greater amount in tolls.

It is true that to participate in the FLDP, a driver must purchase a transponder for $27.50. The

right to purchase is not restricted to residents, but is open to all. The decision whether to do so turns on one's anticipated frequency of use. The distance a driver lives from Boston will be a factor, but not the only factor, affecting the frequency with which he or she is likely to drive through the toll plazas or the tunnels. But the frequency calculus creates no resident versus nonresident classification. The geographical reality is that a commuter from Providence, RI or Manchester, NH is no more distant from Boston than one from Worcester, MA; a commuter from Hartford, CN or Portland, ME is no further from Boston than one from Springfield, MA; and residents of cities in Western Massachusetts such as Pittsfield are further than residents of any of these major out-of-state population centers. Thus, plaintiffs' claim that MTA "charg[es] millions of non-residents a higher cost per mile for traveling the exact same distance," Appellants' Br. at 10, is pure fiction. The toll is higher for nonparticipants than for participants, regardless of where they live. Thus, many infrequent nonparticipating drivers living in and around Boston will pay a higher toll for whatever distances they may drive than commuters from, say, Manchester, Providence or Portland who have chosen to participate.

Plaintiffs rely principally on *American Trucking Ass'n v. Scheiner*, 483 U.S. 266, 107 S.Ct. 2829, 97 L.Ed.2d 226 (1987), to support their argument. That case involved the validity of flat taxes imposed on trucks. Pennsylvania first required owners of trucks operating on its roads to purchase an identification marker. For vehicles not registered in Pennsylvania the fee was $25, while owners of vehicles registered in Pennsylvania were not required to pay the fee. Later,

Pennsylvania reduced the marker fee to $5 and instituted an axle tax on all trucks above a certain weight. At the same time, it reduced the registration fee for in-state trucks in an amount identical to the new axle tax, thereby eliminating the effect of the axle tax on in-state vehicles. These flat taxes were assessed annually without regard to the number of miles traveled on Pennsylvania roads. *Id.* at 274-75, 281-82, 107 S.Ct. 2829.

The Court stated that the issue was whether the methods by which the flat taxes are assessed discriminate against some participants in interstate commerce and held:

> We find dispositive those of our precedents which make clear that the Commerce Clause prohibits a State from imposing a heavier tax burden on out-of- state businesses that compete in an interstate market than it imposes on its own residents who also engage in commerce among States.

*Id.* at 282, 107 S.Ct. 2829. Although the Court's discussion in *Scheiner* largely focuses on the validity of an unapportioned flat tax on trucks, the decision rests on the *320 premise that the imposition of the Pennsylvania tax did not treat interstate and intrastate interests evenhandedly. Thus, the case is not apposite. The FLDP does not impose a heavier burden--toll or otherwise--on out-of-state residents. Plaintiffs' discussion of the Court's analysis of potential defenses of the Pennsylvania scheme and, in particular, the user fee defense, is therefore not relevant. The Court's rejection of that defense--based on the fact that

Pennsylvania's taxes discriminate against out-of-state vehicles--affords no support to plaintiffs' claim that MTA's nondiscriminating program violates the Commerce Clause.

[4] Moreover, the FLDP bears no resemblance to Pennsylvania's flat tax. As plaintiffs argue, the Pennsylvania tax imposed for the privilege of using Pennsylvania roads discriminated because that privilege was more valuable to residents than nonresidents. The tolls in issue here, in contrast, are imposed on a per-use basis. They are imposed only when the driver actually uses the toll plazas or tunnels and are directly proportional to that use. As the *Scheiner* court put it, "[s]o long as a State bases its tax on a relevant measure of actual road use, obviously both interstate and intrastate [drivers] pay according to the facilities in fact provided by the State," and the program places no undue burden on interstate commerce. *See id.* at 291, 107 S.Ct. 2829 (*quoting Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 557, 70 S.Ct. 806, 94 L.Ed. 1053 (1950) (Frankfurter, J., dissenting)).

Even if we were to treat these highway tolls as analogous to a flat tax, as plaintiffs appear to argue, MTA "treat[s] [in-state and out-of-state] vehicles with an even hand." *See id.* at 282, 107 S.Ct. 2829. Tolls are the same for both kinds of vehicles and each is eligible to participate in the discount program. That the incentive to participate varies across drivers does not make the program discriminatory. That incentive "affects local and out-of-state vehicles in precisely the same way, and thus does not implicate the Commerce Clause." *Id.* at 283 n. 15, 107 S.Ct. 2829. Thus, contrary

to plaintiffs' contention, the program does not fail *Scheiner's* internal consistency test. Appellants' Br. at 22. As the Court put it, if more than one state adopted a similar discount program, the Commerce Clause is satisfied where the programs would "maintain state boundaries as a neutral factor in economic decision making." *Id.* at 282-83, 107 S.Ct. 2829; *see also id.* at 284, 107 S.Ct. 2829 ("To pass the 'internal inconsistency' test, a state tax must be of a kind that, 'if applied by every jurisdiction, there would be no impermissible interference with free trade.' "); *American Trucking Ass'n, Inc. v. Sec'y of Admin.*, 415 Mass. 337, 613 N.E.2d 95, 102 (Mass.1993) (stating that "[a] valid user fee will pass the internal consistency test because the full measure of the fee is not imposed for merely crossing the taxing State's border, but is directly related in purpose and amount, to the use of a service or privilege.")

We think that the case before us is more akin to *Evansville- Vanderburgh Airport Auth.. v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972), which upheld the validity of a flat charge of $1.00 per passenger enplaning on a commercial airliner operating from the Evansville airport. The Court held that because both interstate and intrastate flights are subject to the same charge, the fee did not discriminate against interstate commerce, even though the vast majority of passengers boarding aircraft traveled in interstate commerce. It stated that

> so long as the toll is based on some fair approximation of use or privilege for use, as was that before us in *321*Capitol Greyhound [Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053

> (1950)], and is neither discriminatory against interstate commerce nor excessive in comparison with the governmental benefit conferred, it will pass constitutional muster, even though some other formula might reflect more exactly the relative use of the state facilities by individual users.

*Id.* at 716-17, 92 S.Ct. 1349. In *Capitol Greyhound*, cited by the Court, it had upheld the validity of Maryland's excise tax of 2% of the value of a vehicle imposed as a condition precedent to operation of the vehicle in the State of Maryland, in part because the tax "applie[d] to interstate and intrastate commerce without discrimination." 339 U.S. at 544, 70 S.Ct. 806.

Here, the tolls are assessed uniformly in direct proportion to use of the toll facilities and have not been shown to be excessive, either standing alone or by reason of the unrestricted availability of the frequent traveler discount.

**B. The FLDP Is Not Discriminatory On Its Face Or In Its Practical Effect**

[5] Plaintiffs offer three arguments in support of their second contention. First, they say that the FLDP "invariably result[s] in a significant degree of permanent cost exporting onto the interstate traveler, non-resident and/or non-participant." Appellants' Br. at 29. As we have explained above, interstate travelers pay the same tolls as resident travelers. Any traveler can qualify for a discount but the decision whether to do so turns principally on anticipated frequency of travel. While a New York resident is likely to make infrequent

trips through the toll plazas and tunnels, so is the resident of a "wealthy suburb of Boston" who prefers using public transportation to driving his or her car into the city. Appellants' Br. at 32. But the incremental burden of the undiscounted toll for the infrequent traveler is by necessity de minimus. Plaintiffs' inflammatory assertion that "[e]ach year millions of non-FASTLANE participants pay a significant toll premium, a tariff of 20% or 33% greater than participants (*i.e.* Massachusetts residents), for using the same stretch of road," Appellants' Br. at 14, proves nothing; it is expected that nonparticipants will pay higher tolls but it does not follow that interstate commerce will be burdened, much less that it will suffer discrimination. Unlike flat taxes imposed on interstate truck operators, the collection of undiscounted tolls from the occasional traveler-- resident or non-resident-- results in no discernable "cost exporting."

Second, they argue that the FLDP has a discriminatory intent and purpose. Plaintiffs point out that the FLDP was adopted in response to political pressure to benefit commuters, surely a constitutionally valid purpose. Appellants' Br. at 31. They go on to argue that when MTA sought to quell constitutional concerns by offering discounted tolls to nonresidents who participate in the FLDP, it merely "sought to mask the discriminatory impact on non-residents by offering a hollow option that few non-residents will choose." Appellants' Br. at 32.

However, plaintiffs' First Amended Complaint contains no allegation of discriminatory purpose; on the contrary, plaintiffs allege that to head off concerns that the Resident Only Fast Lane Discount Program may

violate the interstate Commerce Clause ... defendants modified the Resident Only Discount Program to apply to all travelers, residents and non-residents, equipped with FAST LANE transponders.

*322 First Am. Compl. at 27. We think that plaintiffs' argument falls of its own weight. *See Grant's Dairy v. Comm'r of Me. Dep't of Agric.*, 232 F.3d 8, 23 (1st Cir.2000) (innocuous expressions of concern insufficient to raise inference of protectionist intent).

Finally, plaintiffs contend that the FLDP is discriminatory on its face because it regulates the toll that one pays based on one's participation in the state sponsored FASTLANE electronic toll collection program to the exclusion of all other competing electronic toll collection systems like E-Z Pass offered by other states or that do not participate in any electronic toll collection system. Appellants' Br. at 33. The logic underlying the argument is elusive. Participation in FAST LANE does not preclude participation in other electronic toll collection systems; nothing in the record indicates that automobiles cannot carry more than one transponder. Moreover, it can hardly be said that FAST LANE, which operates on three Massachusetts toll collection points, competes with systems that operate on toll collection points in New York, New Jersey and Delaware. Participants in systems in those states are not "penalized," as plaintiffs argue, for their decision to choose a different system. Appellants' Br. at 33. Their participation in such systems has no impact on their right to participate in the FLDP.

**C. The FLDP Does Not Shift Highway Costs To Non-Residents and Serves A Legitimate Local**

**Interest Unrelated To Economic Protectionism**

We address plaintiffs' third and fourth contentions together. Arguing from the premise that the FLDP redistributes the increased toll burden from Boston commuters to nonresidents and forces nonresidents "with little or no incentive to participate to pay a disproportionate share of the state's highway costs," plaintiffs contend that the FLDP serves no legitimate local interest unrelated to economic protectionism. Appellants' Br. at 38. For the reasons discussed at length above, the premise is flawed. There is nothing to show that one who drives from New York to Boston and pays the $1.00 toll pays a "disproportionate share of the state's highway costs" compared to the suburban commuter who, driving over a much shorter distance on the state's highways, pays the discounted toll of $.75. Thus, the program does not implicate the balancing test under *Pike v. Bruce Church*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970). *See* Appellants' Br. at 40.

[6][7] Even if it did, however, the plan passes muster. Under the *Pike* balancing test, "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142, 90 S.Ct. 844. Here, the effect on nonresident drivers--just as on resident drivers--is that to qualify for the discounts, they must invest $27.50 to acquire a transponder and maintain an account balance of $10-$20. That burden is *de minimis* in relation to the public benefits of achieving a more equitable sharing of

toll burdens among commuters, some of whom pay no tolls on their routes, and facilitating the implementation of an essential funding scheme for major highway improvements.

We have considered other arguments advanced by plaintiffs and found them to be without merit.

## CONCLUSION

We conclude that the FLDP treats Massachusetts-based and other vehicles with *323 an even hand and that the program does not interfere with commerce between the states. Accordingly, the judgment of the district court is **AFFIRMED**.

**AFFIRMED**.

348 F.3d 315

**Appendix B**

**United States Court of Appeals**
**For the First Circuit**

**No. 03-1312**

Peter A. DORAN, individually and on behalf of all others similarly situated; Wendy E. Saunders; individually and on behalf of all others similarly situated,

Plaintiffs, Appellants,

v.

MASSACHUSETTS TURNPIKE AUTHORITY; Matthew Amorello; Christy Mihos; Jordan Levy,

Defendants, Appellees.

Before

Boudin, Chief Judge,
Torruella and Selya, Circuit Judges,
Lynch, Lipez and Howard Circuit Judges
Schwarzer,* Senior District Judge.

ORDER OF COURT

Entered: **December 15, 2003**

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the

judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

In accordance with Internal Operating Procedure X, the petition for rehearing en banc has been treated also as a petition for panel rehearing."

By the Court:

RICHARD CUSHING DONOVAN,
Clerk

**Appendix C**

**United States District Court**
**District of Massachusetts**

Peter A. DORAN and Wendy E. Saunders, individually and on behalf of all others similarly situated, Plaintiffs,

v.

MASSACHUSETTS TURNPIKE AUTHORITY, Matthew Amorello, Christy Mihos, and Jordan Levy, Defendants.

No. CIV. 02-11361-NG.

Jan. 24, 2003.

Residents of states neighboring Massachusetts brought § 1983 action against the Massachusetts Turnpike Authority (MTA) and its individual board members, alleging that the discounts offered by the MTA to subscribers to state toll booth program, but not to subscribers of compatible services favored in other states, violated the dormant commerce clause. Defendants moved to dismiss. The District Court, Gertner, J., held that: (1) discount program did not have an extraterritorial reach; (2) discount program was not discriminatory against out-of-state drivers in its practical effect; and (3) discount program did not excessively burden interstate commerce.

Dismissed.

West Headnotes

[1] Commerce 12
83k12 Most Cited Cases

For purposes of determining whether a state statute or practice violates the commerce clause, the statute or practice has an extraterritorial reach when it purports to regulate activity conducted entirely beyond the state's borders or has the practical effect of subjecting out-of-state conduct to its terms. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[2] Commerce 82.35
83k82.35 Most Cited Cases

[2] Turnpikes and Toll Roads 43
391k43 Most Cited Cases

State discount program offered to purchasers of transponders used on state toll roads did not have an extraterritorial reach, for purposes of determining whether the discount program violated the commerce clause, given that the discount offer related to highway tolls paid within the state for travel on state toll roads. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[3] Commerce 82.35
83k82.35 Most Cited Cases

[3] Turnpikes and Toll Roads 43
391k43 Most Cited Cases

State discount program offered to purchasers of transponders used on state toll roads was not

discriminatory against out-of-state drivers in its practical effect, for purposes of determining whether the discount program violated the commerce clause, given that out-of-state drivers were able to avail themselves of the discount by subscribing to the program. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[4] Commerce 12
83k12 Most Cited Cases

If a policy disfavors out-of-state interests as a group, without exception, it is discriminatory and subject to strict scrutiny under the dormant commerce clause; if it does not disfavor nonresidents as a class but is shown to harm out-of-state interests more than in-state interests, the policy is properly reviewed under a more lenient standard of whether it burdens interstate commerce excessively. U.S.C.A. Const. Art. 1, § 8, cl. 3.

[5] Commerce 82.35
83k82.35 Most Cited Cases

[5] Turnpikes and Toll Roads 43
391k43 Most Cited Cases

State discount program offered to purchasers of transponders used on state toll roads did not excessively burden interstate commerce. U.S.C.A. Const. Art. 1, § 8, cl. 3.

*49 Stephen V. Saia, Law Offices of Stephen V. Saia, Pembroke, for Peter A. Doran, individually and on behalf of all others similarly situated, Wendy E. Saunders, individually and on behalf of all others similarly situated, Plaintiffs.

James A. Aloisi, Goulston & Storrs, PC, Piper Rudnick LLP, Donnelly, Conroy & Gelhaar, LLP, Joshua M. Davis, Peter N Kochansky, Goulston & Storrs, Boston, for Massachusetts Turnpike Authority, Matthew Amorello, Christy Mihos, Jordan Levy, Defendants.

**MEMORANDUM AND ORDER**

GERTNER, District Judge.

The Massachusetts Turnpike Authority ("MTA") maintains a "FAST LANE" electronic toll collection system that enables subscribing drivers to pass through tollbooths without stopping to pay tolls in cash. A device known as a "transponder" signals to the tollbooth that a particular FAST LANE subscriber has passed through the toll gate, and an appropriate toll is assessed against the driver's FAST LANE account (or debited from his bank account) for billing. Turnpike authorities in other states have adopted similar systems with different brand names, and some of these systems are interoperable with one another. For example, transponders from the EZ-Pass system that governs cash- free access to the New York, New Jersey, and Pennsylvania toll roads will work on Massachusetts' FAST LANE signal detectors, and vice versa.

Plaintiffs Peter A. Doran and Wendy E. Saunders bring a class action complaint under § 1983 against the Massachusetts Turnpike Authority ("MTA") and its individual board members, alleging that the discounts offered by the MTA to FAST LANE subscribers--but not to subscribers of compatible services favored in other states (like EZ-Pass)--violate

the dormant commerce clause. The plaintiffs press for a preliminary injunction suspending the discount program, and the defendants have countered with a motion to dismiss the complaint. For the reasons set forth below, the motion to dismiss is **GRANTED**, and the plaintiffs are **DENIED** their preliminary injunction.

## I. FACTS/PROCEDURAL HISTORY

In March 1997, Governor William Weld, signed the Metropolitan Highway Systems ("MHS") bill. Among other provisions, the bill authorized a toll increase at the Allston-Brighton and Route 128 toll plazas from $.50 to $1, at the Ted Williams Tunnel from $2 to $3, and at the Sumner Tunnel from $2 to $3. The revenue from the toll hikes would pay for bonds issued to finance the Central Artery/Third Harbor Tunnel Project, commonly known as the "Big Dig." The project aims to bury a stretch of Interstate 93 ("I-93") beneath the city of Boston and extend Interstate 90 ("I-90") to Logan International Airport. It is the defendants' responsibility to generate through tolls approximately $1.5 billion of the nearly $6 billion required to complete work on the Interstate 90 segment.

The scheduled effective date of the toll increase was January 1, 2002. In November 2001, in response to public opposition, the MTA board of directors postponed the proposed toll hikes to July 1, 2002. Strong and sustained public opposition to the toll hikes also led lawmakers to seek out possible alternatives to funding the Big Dig.

In addition, the defendants agreed to implement a Resident Only Discount Program, discounting the

tolls for state residents who drive passenger cars equipped with the FAST LANE electronic toll collection *50 system at the Allston-Brighton and Route 128 interchanges, as well as the Ted Williams and Sumner Tunnels. FAST LANE subscribers would save $.25 at the Allston-Brighton and Route 128 toll plazas, and $.50 at the tunnels.

As I explain in brief above, the FAST LANE system enables drivers to pass through toll plazas without having to stop and pay. Subscribers to the FAST LANE program are issued a "transponder," a small plastic device that mounts on the windshield. As the car passes through a designated FAST LANE toll plaza lane, the transponder signals that car's identity to the MTA, which automatically levies a toll against the driver's credit card or bank account. Drivers must purchase a transponder from FAST LANE to participate in the program. Each transponder costs $27.50. Subscribers can choose from several toll payment options, the most popular of which is to assign the FAST LANE account to a credit card, which is billed $20 to open the account. Thereafter tolls are deducted from the $20 until $10 remains in the account, at which point an additional $10 is billed to the credit card account.

This resident-only FAST LANE discount was to be implemented on July 1, 2002. On July 3 an article in the Boston Globe publicized concerns about the discount's constitutionality under the dormant commerce clause of the U.S. Constitution. [FN1] On or about July 3 the defendants altered the discount program to eliminate the resident-only component of the discount. Defendant Matthew Amorello observed

that a few thousand out-of-state FAST LANE subscribers--most of them from Connecticut--would become eligible for discounts. [FN2]

FN1. The dormant commerce clause, as I will explain more fully below, impresses upon the several states a duty to refrain from enacting policies that discriminate against commercial interests in other states or otherwise unduly burden commerce among the states.

FN2. Defendants Amorello, Christy Mihos, and Jordan Levy are board members of the Turnpike Authority.

Plaintiff and Vermont resident Peter A. Doran drove through the Allston- Brighton and Route 128 toll plazas on July 4, 2002 and paid the full toll. Plaintiff and New York resident Wendy E. Saunders, who has an EZ-Pass transponder, drove through the same plazas a day later and did not get the benefit of the transactions.

On August 19, 2002 the plaintiffs filed a motion for a preliminary injunction [document # 5]. The defendants responded with a motion to dismiss [document # 7] and included in their initial opposition to the preliminary injunction motion a request that I defer ruling on the preliminary injunction. The parties appeared to argue their positions on November 6, 2002, and at the hearing I allowed supplemental briefing.

## II. DISCUSSION

A complaint is subject to dismissal under Rule

12(b)(6) only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Gorski v. New Hampshire Dep't of Corrections*, 290 F.3d 466, 473 (1st Cir.2002) (*quoting Hishon v. King & Spalding*, 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984)). The allegations in the complaint should be accepted as true and all reasonable inferences must be drawn in favor of the plaintiff. *Moss v. Camp Pemigewassett, Inc.*, 312 F.3d 503, 506 (1st Cir.2002); *Aybar v. Crispin- Reyes*, 118 F.3d 10, 13 (1st Cir.1997).

It is the plaintiffs' position that I should rule on their preliminary injunction motion first. But the dismissal standard--whether *51 the complaint states a claim for which relief can be granted--is a logical precondition for establishing a likelihood of success on the merits of the claim. It seems appropriate and economical, then, to begin with the issues raised in the defendants' motion to dismiss. *See Ecological Sys. Technology v. Aquatic Wildlife*, 142 F.Supp.2d 122, 126 (D.Mass.2000) (denying as moot a motion for preliminary injunction following the dismissal of claims against the only remaining defendant); *see also Mangieri v. Mangieri*, 226 F.3d 1, 2-3 (1st Cir.2000) (noting, while affirming the district court's dismissal of claims, its denial of a preliminary injunction).

**A. Motion to Dismiss**

The Commerce Clause of the United States Constitution affords Congress the authority to "regulate Commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The Supreme Court has long recognized a negative or "dormant" provision of the

Commerce Clause, and well-entrenched law recognizes a constitutional principle arising from the Commerce Clause that the individual states (and their localities) have a limited capacity to exert their will upon interstate commerce. *Camps Newfound/Owatonna, Inc. v. Town of Harrison, Me.*, 520 U.S. 564, 571-72, 117 S.Ct. 1590, 137 L.Ed.2d 852 (1997).

A dormant commerce clause inquiry is best performed in three parts. The first question is whether the FAST LANE discount has an extraterritorial reach, that is, does it regulate activity conducted entirely beyond the state's borders, which is per se unlawful? *See Pharmaceutical Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir.2001). I conclude that it does not. The second question is whether the regulation affirmatively or clearly discriminates against interstate commerce on its face or in its "practical effect." Id. In that case the regulation would be impermissible unless the defendants could meet a substantial test--whether the discrimination is demonstrably justified by a valid factor unrelated to protectionism. I conclude that the FAST LANE discount does not fit into this category at all. Finally, the third question is whether a regulation that is not facially discriminatory (the second category above) incidentally burdens interstate commerce. Such a regulation would be impermissible unless the defendant passed a somewhat less strict balancing test--whether the burden on interstate trade is clearly excessive in relation to the local benefits. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

**1. Does the FAST LANE Discount Have an Extraterritorial Reach?**

[1][2] A state statute or practice has an extraterritorial reach when it purports to regulate activity conducted entirely beyond the state's borders or has the practical effect of subjecting out-of-state conduct to its terms. *Concannon*, 249 F.3d at 79. The discount offer relates to highway tolls paid within Massachusetts for travel on Massachusetts toll roads. I do not find the program to have an extraterritorial reach.

**2. Does the FAST LANE Discount Discriminate between Residents of Massachusetts and Out-of-Staters?**

Both parties recognize that a state policy that discriminates [FN3] between in-state *52 and out-of-state interests is "virtually per se invalid." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality of the State of Oregon*, 511 U.S. 93, 99, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994); *see also C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 391-92, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994) (citing a list of cases invalidating laws requiring that goods be processed in-state before export). The "virtually" qualifier reflects the Court's determination that discriminatory policies are passable when they serve a legitimate local purpose and no nondiscriminatory means would achieve the same end. *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 91 L.Ed.2d 110 (1986); *cf. also Utility Contractors Ass'n of New England v. City of Worcester*, 236 F.Supp.2d 113, 2002 WL 31892919, at *4 (D.Mass. Dec.23, 2002) (noting that policies charged as discriminatory under

the Privileges and Immunities Clause are valid when there is a "substantial reason" for them and less restrictive means are unavailable).

FN3. There is no art or nuance to the term discrimination in the dormant commerce clause context. The Supreme Court observes that the term "simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345.

The parties do not confront the threshold question whether the dormant commerce clause might apply to an affirmative discount awarded discriminatorily (as opposed to a more direct regulatory constraint on action). That issue is well-settled in the plaintiffs' favor. In *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 114 S.Ct. 2205, 129 L.Ed.2d 157 (1994), the Court made the point that while an evenhanded tax does not implicate the dormant commerce clause, "when a nondiscriminatory tax is coupled with a subsidy to [in-staters] hurt by the tax" with the result that "the tax is effectively imposed only on out-of-state products," the scheme is discriminatory. Id. at 194, 200, 114 S.Ct. 2205. The Court's reasoning in *West Lynn Creamery* easily translates to the present case: the availability of discounts to FAST LANE subscribers effectively places the burden of the toll increase upon nonsubscribers. As a result, if the plaintiffs can prove that the discount policy discriminates against out-of-state drivers, the MTA will not escape liability merely by describing the toll

discount as a subsidy.

**a. Facial Discrimination**

The plaintiff argues that the discount program is facially discriminatory because the discount plan sets up an "Out of State Toll Gate." The cases that Doran cites--*Oregon Waste Sys.*, 511 U.S. at 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994), *Chem. Waste Management, Inc. v. Hunt*, 504 U.S. 334, 112 S.Ct. 2009, 119 L.Ed.2d 121 (1992); *Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318, 97 S.Ct. 599, 50 L.Ed.2d 514 (1977)--all invalidated schemes that drew express distinctions between in-state and out-of-state interests and gave the in-staters more favorable treatment.

The distinction drawn on the face of the discount scheme is between FAST LANE subscribers and nonsubscribers, not between Massachusetts residents and out-of- staters. Accordingly, the more pertinent analysis in the per se violation inquiry is whether the scheme discriminates in its "practical effect."

**b. Discrimination in Practical Effect**

It is the view of the Supreme Court that a state or locality ought not avoid per se liability under the dormant commerce clause for schemes that do not discriminate on their face, but more artfully achieve a preference for in- staters via pretextual *53 distinctions. *West Lynn Creamery*, 512 U.S. at 201, 114 S.Ct. 2205 ("[O]ur cases have eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." As the Court declared over 50 years ago: " 'The commerce clause forbids discrimination, whether

forthright or ingenious.' " (*quoting Best & Co. v. Maxwell*, 311 U.S. 454, 455-56, 61 S.Ct. 334, 85 L.Ed. 275 (1940))).

[3] A fair analysis of the "practical effect" of the discount program, in my mind, finds that it confronts would-be subscribers with an economic decision. FAST LANE requires its subscribers to post a $27.50 deposit for its transponders and open an account with a minimum balance of $10, whereas other electronic toll collection services--EZ-Pass, for one--provide transponders to drivers at no charge. The result is that drivers will enroll in FAST LANE to take advantage of the discount only when they travel toll roads frequently enough that the transponder would "pay for itself." Facially, then, the discount plan favors FAST LANE subscribers over non-FAST LANE subscribers, and in its practical effect it favors those who frequent the toll roads over occasional travelers.

The upshot of that economic analysis, in the plaintiffs' view, is that Massachusetts residents as a class are indirectly favored, because they are more likely to avail themselves repeatedly of the toll roads within their state. As the plaintiffs point out, nonresidents "will be unable to recoup the investment in the transponder and the pre-paid toll minimum balance because they may not travel enough to the forum state." But it is not the case that an out-of-state driver will necessarily favor the cost-free alternative; an out- of-state resident could well travel Massachusetts' toll roads often enough that he makes up for his initial expenditure in toll discounts. More importantly, nothing in the MTA's discount plan or other regulations precludes out-of- staters from driving

the Massachusetts toll roads with that frequency.

The crucial issue here is whether the fact that there is no perfect congruence between FAST LANE membership and residency status precludes any charge of discrimination, facial or practical. The parties do not expressly argue that point, though their positions hint at different assumptions on the law. The plaintiffs' view seems to be that though a scheme may not be drawn to distinguish perfectly between interests inside and outside a state, at a certain point the numbers of harmed in-staters and unharmed out-of-staters becomes so small that the scheme must be held discriminatory in its practical effect.

It is my view that at a bare minimum (that is, whether or not it prefers in- staters as group), the challenged practice must disfavor out-of-staters as a group, and the Supreme Court's language and holdings bear that out. That is, the reference to "practical effect," when the Court considers whether a regulation affirmatively discriminates against interstate transportation on its face or in its practical effect, *C & A Carbone, Inc. v. Town of Clarkstown, New York*, 511 U.S. 383, 394, 114 S.Ct. 1677, 128 L.Ed.2d 399 (1994); *see also id.* at 402, 114 S.Ct. 1677 (O'Connor, J., concurring), does not open the door to a disparate impact analysis, as that is understood in other settings. A discrimination analysis under the dormant commerce clause, rather, is triggered by the wholesale exclusion of out-of-staters from the regulation as a group either directly or through pretext or subterfuge. *See, e.g., Maryland v. Louisiana*, 451 U.S. 725, 734, 757-58, 101 S.Ct. 2114, 68 L.Ed.2d 576 (1981) (finding a First-Use Tax on natural gas discriminatory in practical effect where "Louisiana consumers of OCS are *54 for the

most part not burdened by the tax, but it does uniformly apply to gas moving out of the State"). In contrast, the exclusion of some percentage of out-of-staters, but not all of them, does not fit within the "discrimination" test, although it may be evaluated under the "excessively burden" test.

In the *C & A Carbone* case, the Court confronted a municipal ordinance requiring all nonhazardous solid waste in Clarkstown to be deposited at a single transfer station in the town. *Id.* at 387-88, 114 S.Ct. 1677. The Court found the ordinance to be discriminatory, "for it allows only the favored operator to process waste that is within the limits of the town," so depriving out-of-state waste processors of an in-state market. *Id.* at 391, 114 S.Ct. 1677. The fact that all in-state processors but one suffered from the ordinance as well did not change the result. *Id.* ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition.").

Justice O'Connor concurred in the result but dissented from the Court's finding that the regulation at issue was "discriminatory" under the Court's dormant commerce clause jurisprudence. She concluded that it was not, but that it did "excessively burden" interstate commerce under the third test. *Id.* at 405, 407, 114 S.Ct. 1677 (O'Connor, J., concurring).

Significantly, the debate between the court majority and Justice O'Connor focused on the impact of the regulation on in-staters--whether the scheme must at least favor the interests of an entire locality in the state, be it a city or a county, as Justice O'Connor concluded--or whether it is enough that all in-staters

but one are disadvantaged. (Justice O'Connor would require that the scheme favor a locality of some sort on the ground that "the fact that interests within the regulating jurisdiction are equally affected by the challenged enactment counsels against a finding of discrimination," as one would expect those interests to contest the regulation. Id. at 404, 114 S.Ct. 1677.) Neither Justice O'Connor nor the majority, however, would extend the definition of "discriminatory" to include the present case where not all out-of-state residents are burdened.

[4] The FAST LANE discount, unlike the provision at issue in *C & A Carbone*, does not exclude out-of-state drivers as a group. Out-of-state drivers are able to avail themselves of the discount by subscribing to the FAST LANE program, and it is not inconceivable that some of them will. Because out- of-state drivers in whatever number can partake of the toll discounts, I cannot hold that the discount program is discriminatory in its practical effect. *See Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972) (finding airport taxes nondiscriminatory because "[w]hile the vast majority of passengers who board flights at the airports involved are traveling interstate, both interstate and intrastate flights are subject to the same charges"). [FN4]

FN4. As I have noted, the dormant commerce clause ban on discrimination, unlike its counterparts in the civil rights statutes, *see, e.g., Langlois v. Abington Housing Authority*, 234 F.Supp.2d 33, 2002 WL 31681317, at *16 (D.Mass. Nov.27, 2002), does not

accommodate a "disparate impact" analysis. That is, a plaintiff may not establish that a policy is discriminatory and therefore "virtually per se invalid" under the dormant commerce clause by showing that the policy disproportionately harms out-of- state interests more than in-state interests. If a policy disfavors out- of-state interests as a group, without exception, it is discriminatory and subject to strict scrutiny under the dormant commerce clause. If it does not disfavor nonresidents as a class but is shown to harm out-of-state interests more than in-state interests, the policy is properly reviewed under a more lenient standard: does it burden interstate commerce excessively?

***55 3. Does the FAST LANE Discount Excessively Burden Interstate Commerce?**

[5] It is not to be denied that out-of-state drivers are less likely to pay Massachusetts tolls regularly enough to make a FAST LANE membership profitable. Massachusetts residents will almost certainly benefit from the discount program in greater numbers than out-of-state drivers will, with the result that the FAST LANE discount, while not discriminatory, affects interstate commerce. It remains to consider, under a less exacting standard, whether that burden is excessive.

This analysis entails a balancing test: "nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.' "

*Oregon Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345 (*quoting Pike*, 397 U.S. at 142, 90 S.Ct. 844). After reviewing the deferential case law on highway tolls and examining the implications of the FAST LANE discount, I find that the burden the FAST LANE discount imposes on interstate commerce--if any--is negligible. Cast against the local benefit the defendants have identified, a more equitable distribution of toll burdens within the state, the burden on interstate commerce is far from excessive.

It is well-settled that a highway toll does not burden interstate commerce if it is reasonable. In fact, the Supreme Court has held and repeated that

> [W]here a state at its own expense furnishes special facilities for the use of those engaged in commerce, interstate as well as domestic, it may exact compensation therefor. The amount of the charges and the method of collection are primarily for determination by the state itself; and so long as they are reasonable and are fixed according to some uniform, fair, and practical standard, they constitute no burden on interstate commerce.

*Evansville-Vanderburgh Airport*, 405 U.S. at 712-13, 92 S.Ct. 1349 (*quoting Hendrick v. Maryland*, 235 U.S. 610, 624, 35 S.Ct. 140, 59 L.Ed. 385 (1915)) (alterations in original). State-maintained highways affirmatively facilitate interstate commerce and travel. Accordingly, toll regimes designed to defray the costs of these facilities must therefore be discriminatorily implemented or "arbitrary or unreasonable" in their amounts, so burdening interstate commerce, to run

afoul of the dormant commerce clause. *Id.* at 712-13, 92 S.Ct. 1349. I have already held that the toll scheme in this case is not discriminatory. I now assess whether the MTA's imposition of a FAST LANE discount is so unreasonable as to burden interstate commerce.

The *Evansville* Court's survey of the case law concluded that a scheme that levies tolls according to some rational measurement of drivers' use of the highways will not burden interstate commerce:

> While the Court has invalidated as wholly unrelated to road use a toll based on the carrier's seating capacity and the amount of gasoline over 20 gallons in the carrier's gas tank, we have sustained numerous tolls based on a variety of measures of actual use, including: horsepower, number and capacity of vehicles, mileage within the State, gross-ton mileage, carrying capacity, and manufacturer's rated capacity and weight of trailers.

*56 *Id.* at 715, 92 S.Ct. 1349 (citations omitted). The Massachusetts highway toll scheme, like those approved by the Court above, is use-based and so does not in itself burden interstate commerce. Because of the FAST LANE discount program--which is profitable only to frequent users of the toll roads--the toll scheme is more loosely tailored to measured use than it might otherwise be. That is, those who frequently drive the I-90 Boston Turnpike extension will subscribe to FAST LANE and get the discount. The toll is still assessed on a per-use basis, but frequent drivers enjoy a *lower* per-use rate because they travel the toll roads *more often.*

It is clear that because the roads themselves facilitate interstate commerce, courts are not to give exacting scrutiny to the assessments of tolls that maintain them. The case law, however, does not address the question whether a highway toll scheme, otherwise rationally crafted to reflect drivers' use of state facilities, burdens interstate commerce by tacking on discounts to frequent travelers. The Supreme Court's ruling in *Capitol Greyhound Lines v. Brice*, 339 U.S. 542, 70 S.Ct. 806, 94 L.Ed. 1053 (1950), is instructive here. The scheme at issue in Brice taxed common carriers in exchange for registration privileges to transport passengers on Maryland's roads. Maryland's scheme combined a per-mile tax assessment with an initial assessment of 2% of the fair market value of the vehicle. The plaintiffs challenged the 2% provision, arguing that the assessment "varies for each carrier without relation to road use." *Id.* at 545, 70 S.Ct. 806. The *Brice* Court nonetheless upheld the 2% assessment, observing that the tax was actionable only as applied, that is, if the ultimate amount owed by a given driver was unreasonable. *Id.* at 547-48, 70 S.Ct. 806.

The issue raised by the FAST LANE discount is similar to that before the Court in Brice. The 2% component of Maryland's scheme bore no direct relation to the assessed vehicle's use of Maryland's roads. Likewise, the FAST LANE discount is not directly related to use--the amount owed for use differs based on whether or not the driver has elected to purchase a transponder. If anything, the discount affects toll assessments in inverse proportion to use. The more a driver uses the roads, the more likely he is to subscribe to FAST LANE and thus get the discount.

Nonetheless, both in Brice and in this case, the challenged components work in conjunction with a larger context of toll assessment that is tied to use. Drivers in Massachusetts pay different tolls depending on the distance traveled on the Turnpike, and they pay a fixed fee every time they use a tolled bridge or tunnel. The layering of discounts not directly correlated with use on top of this scheme does not, under *Brice*, make it unconstitutional. The plaintiffs do not dispute this; nor do they argue in the direction that the case law directs them: that the tolls owed on the MTA's highways are so unreasonably high as to burden interstate commerce.

The plaintiffs instead argue that the FAST LANE discounts burden interstate commerce because in-state drivers will make disproportionate use of them. This argument is in fact closely tied to their argument that the discount scheme is discriminatory. They argue that the discount, tied as it is to frequent use of particular toll roads inside the Commonwealth, rewards and encourages intrastate transit at the expense of interstate travelers who must pick up the "slack" in financing the Big Dig.

It is a fact that, while not actually discriminatory, in-state drivers will be much *57 more likely than out-of-staters to purchase a FAST LANE transponder to get the ensuing discount. However, the severity of this result, which certainly does inhibit interstate commerce, depends upon the degree to which in-staters are more likely than out-of-staters to frequent the toll roads on which the discount the offered. This raises a countervailing consideration: if disproportionately few out-of-staters get the discount,

it is because the traffic on the toll roads tends to be disproportionately intrastate traffic. And if the traffic on the toll roads is disproportionately comprised of in-staters traveling to in-state destinations, the comparative disadvantage to out-of-staters has a negligible impact on interstate commerce. As the disadvantage to out-of-state drivers grows, the impact of that disadvantage on out-of-staters as a group decreases.

For example, it might be that so few out-of-state drivers frequent Massachusetts's discounted toll roads that only a minuscule percentage of the out-of-staters find it worthwhile to purchase the FAST LANE transponder, as against a much larger proportion of Massachusetts drivers. Under these conditions the gap between in-staters and out-of-staters in profitability of the discount is dramatic, and out-of-state drivers suffer as a group. But this result obtains precisely because out-of-state drivers as a group avail themselves of the toll roads so rarely. The injury to out-of-state interests-- and interstate commerce--occurs on a small scale because those "interests" are minimal.

Plain logic therefore compels me to find that the FAST LANE discount's subsidy to frequent travelers has a negligible effect on interstate commerce. For that matter, it is important to calculate into the analysis the two ways in which the FAST LANE discount facilitates interstate commerce. First, the discount rewards repeated and regular use by all drivers of the roads that feed into the stream of commerce, and, second, it makes use of these roads cheaper for a number of travelers.

But I am not to assess solely whether the discount plan burdens interstate commerce; the question before me under the case law is whether the discounts excessively burden interstate commerce in relation to the local benefits they convey. *Oregon Waste Sys.*, 511 U.S. at 99, 114 S.Ct. 1345 (*quoting Pike*, 397 U.S. at 142, 90 S.Ct. 844). The benefit that the defendants identify is a more equitable distribution of the toll burdens that support its highway projects, including the Big Dig. For example, due to the happenstance of existing tollbooths' location on I-90, east-west commuters on that road are assessed tolls twice daily, whereas other commuters pay nothing on their drives to and from work. Moreover, the Big Dig project has required these commuters to pay still greater tolls for the ultimate benefit of drivers who take I-93 in and out of Boston from points north and south. Although the plaintiffs rightly argue that favoring in-state drivers over out-of-state drivers is not legally cognizable as a "local benefit" in this analysis, preferring regular drivers of the toll roads over infrequent drivers does confer a cognizable benefit.

Assessed against the local benefits it provides, the FAST LANE discount program does not excessively burden interstate commerce. In fact, because the discounts in some ways facilitate and encourage the use of Massachusetts' highways, which in turn benefits interstate commerce, it is not clear that, in aggregate, they burden interstate commerce at all. In light of this analysis and the measure of deference the case law gives to toll assessment schemes, I find that the MTA's practice passes this third and *58 final test under the dormant commerce clause.

## III. CONCLUSION

As the challenged discounts to FAST LANE subscribers have no extraterritorial reach, do not discriminate against out-of-state interests, and do not excessively burden interstate commerce, I **GRANT** the defendants' motion to dismiss and **DENY AS MOOT** the plaintiffs' motion for a preliminary injunction.

**SO ORDERED.**

256 F.Supp.2d 48
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**Appendix D**

**United States District Court**
**District of Massachusetts**

| | |
|---|---|
| PETER A. DORAN and WENDY E. SAUNDERS, individually and on behalf of all others similarly situated, | Civil Action No.11361NG |
| Plaintiffs, | PLAINTIFFS DEMAND A TRIAL BY JURY |
| v. | |
| MASSACHUSETTS TURNPIKE AUTHORITY, MATTHEW AMORELLO, CHRISTY MIHOS, and JORDAN LEVY, | |
| Defendants. | |

**FIRST AMENDED CLASS ACTION COMPLAINT**

Plaintiffs, individually, and on behalf of the class members described herein, allege, upon information and belief and based upon the investigation conducted by counsel, as follows:

**INTRODUCTION**

1. This is a class action brought by plaintiffs on their own behalf and on behalf of all other similarly situated persons or entities in the United States who are non-residents of the Commonwealth of

Massachusetts and paid undiscounted full fare tolls or non-residents who paid the discounted fare using a FAST LANE transponder at the Allston-Brighton, Route 128, Ted Williams Tunnel and/or Sumner Tunnel toll plazas on or after July 1, 2002 pursuant to the Massachusetts Turnpike Authority's plan, which offers discounted fares only to those travelers who participate in the Massachusetts Turnpike Authority's FAST LANE automated toll collection system in violation of the interstate Commerce Clause of the United States Constitution. The Commerce Clause prohibits states and their agencies, including the Commonwealth of Massachusetts and the Massachusetts Turnpike Authority, from discriminating against out-of-state residents through non-uniform tariffs and taxes. By overcharging plaintiffs and the class members for tolls and by requiring them to purchase a FAST LANE transponder to participate in the Massachusetts Turnpike Authority's FAST LANE program to receive discounts, defendants discriminated against plaintiffs and members of the class in violation of the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3 and plaintiffs' civil rights, 42 U.S.C. § 1983.

**JURISDICTION AND VENUE**

2. This Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343 as the claims arise under the United States Constitution, Article I, § 8, cl. 3 and 42 U.S.C. § 1983. Declaratory relief is authorized under 28 U.S.C. §§ 2201 and 2202.

3. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b) because the Massachusetts Transportation Authority and the individual defendants in their official capacities reside in the Commonwealth

of Massachusetts and because a substantial part of the events and omissions giving rise to the claims occurred in this District.

**PARTIES**

4. Plaintiff Peter A. Doran is an individual and resides at 64 South Street, Brattleboro, Vermont 05301. He is a non-resident of the Commonwealth of Massachusetts and does not participate in the FAST LANE program nor possess a FAST LANE transponder.

5. Plaintiff Wendy E. Saunders is an individual and resides at 27 Forest Avenue, Albany, New York 12208. She is a non-resident of the Commonwealth of Massachusetts and does not participate in the FAST LANE program nor possess a FAST LANE transponder. She participates in the E-ZPass automated toll collection system.

6. Defendant Massachusetts Turnpike Authority ("MTA") is a quasi-independent state agency duly established under the laws of the Commonwealth of Massachusetts and is charged with the construction and maintenance of the Massachusetts Turnpike, an interstate highway connecting Boston to the Berkshires in Massachusetts. Its principal place of business is located at the State Transportation Building, 10 Park Plaza, Suite 4160, Boston, MA 02116.

7. Defendant Matthew Amorello is Chairman of the board of the MTA.

8. Defendant Christy Mihos is a member of the board of the MTA.

9. Defendant Jordan Levy is a member of the board of the MTA.

10. Defendants Jordan Levy and Christy Mihos were fired by acting Governor Jane Swift after they voted to delay a Massachusetts Turnpike toll increase from January 1, 2002 to July 1, 2002 then were reinstated on the MTA board following a Supreme Judicial Court ruling that acting Governor Swift did not have the authority to fire them.

11. Defendants Matthew Amorello, Jordan Levy and Christy Mihos were on the MTA board at the time the MTA enacted the Resident Only Fast Lane Discount Program and the modified Fast Lane Discount Program outlined below.

**FACTS APPPLICABLE TO ALL COUNTS**

12. The MTA along with the acting Governor of Massachusetts, Jane Swift, and others were collecting information to identify alternative sources of revenue for funding the cost overruns of the Central Artery/Third Harbor Tunnel Project (the "Big Dig") that will bury part of Interstate 93 beneath the City of Boston and extend Interstate 90 to Logan International Airport.

13. Interstate 90, also known as the Massachusetts Turnpike, is a 135-mile long highway that is part of the United States Interstate roadway system and is the primary east-west highway connecting Boston to points west of the city. In 2002, when new connector highways are finished, Interstate 90 will go past Interstate 93 in downtown Boston and end at Logan International Airport in East Boston.

14. The Massachusetts Turnpike is actually two highway systems, the original Massachusetts Turnpike, which opened in 1957, and the Metropolitan Highway System, which the Massachusetts Legislature

created in 1997. The Metropolitan Highway System runs for 12 miles between Route 128/Interstate 95 (including the Route 128 toll plaza) and downtown Boston, and the Sumner-Callahan and Ted Williams Tunnels, which connect to Logan International Airport.

15. As part of the Big Dig, the MTA is responsible of approximately $1.5 billion of the nearly $6 billion completion of the Interstate 90 section.

16. In March 1997, Governor William Weld signed the Metropolitan Highway Systems ("MHS") bill which, among other things, authorized a toll increase scheduled to go into effect on January 1, 2002. Under the law, Massachusetts' tolls were scheduled to rise at the Allston-Brighton and Route 128 toll plazas from 50 cents to $1.00, at the Ted Williams Tunnel from $2 to $3, and at the Sumner Tunnel from $2 to $3. The additional revenue, estimated at $60 million per year, would pay for bonds issued to finance the Big Dig.

17. Although the toll hikes were authorized in the March 1997 law, the MTA board must approve them.

18. On or about November 1, 2001, the MTA board of directors voted to postpone for six months the proposed toll hikes, initially set to go into effect on January 1, 2002, and rescheduled them to go into effect on July 1, 2002.

19. Public opposition to the toll hikes has been so great that lawmakers are searching for alternatives. Specifically, state lawmakers are trying to find other ways to fund the Big Dig because residents who live in the suburbs west of Boston and regularly commute to Boston using the 12 mile section of Interstate 90 and passing through the relevant toll

plazas, including the Allston-Brighton and Route 128 toll plazas, have protested that they are being unfairly forced to pay a larger share of Big Dig costs than commuters who regularly use other roads.

20. In response to this public pressure, the defendants, on or about June 20, 2002 as reported article in the Boston Globe titled *Board Adds Discount to Toll Hike*, agreed to halve the fee hike for state residents who drive passenger cars equipped with the FAST LANE electronic toll system at the Allston-Brighton and Route 128 toll plazas, and to discount the tolls at the Ted Williams and Sumner Tunnels which connect Logan International Airport to downtown Boston.

21. The MTA operates an electronic toll collection system, FAST LANE. FAST LANE enables drivers to pass through toll plazas without having to stop and pay. Vehicles in the FAST LANE system are equipped with a transponder mounted to the windshield. FAST LANE charges $27.50 for each transponder. The transponder signals that the vehicle is going through a designated toll plaza lane. The cost of the toll is then automatically deducted from or charged to a pre-established credit card or bank account. The FAST LANE system has various toll payment options. The most popular prepayment option is to assign your FAST LANE account to a credit card, which is then charged $20 to open the account. Tolls are deducted from that $20. When the account balance reaches a balance of $10, the credit card is automatically charged another $10 to replenish the account to $20. A participant in the FAST LANE program may also pay for tolls on a monthly basis using direct payment from Fleet Bank checking account. Fleet Bank is

headquartered in Boston, Massachusetts. Bank accounts at other institutions do not have this payment option.

22. Accordingly, the minimum cost to participate in the FAST LANE program and receive the discount set forth below is $27.50 based upon the purchase of a FAST LANE transponder, excluding prepayment options and required balances. Using the most popular credit card prepayment option can raise the minimum cost of the FAST LANE program to $37.50. Further, FAST LANE offers only a direct payment through Fleet Bank.

23. Under the initial discount program approved on or about June 20, 2002, all Massachusetts residents who participate in the FAST LANE program were scheduled to be charged 75 cents (a 50% discount on the toll increase) at the Allston-Brighton and Route 128 toll plazas, and $2.50 at the Ted Williams and Sumner Tunnels effective Monday July 1, 2002. Non-residents, including plaintiffs and members of the class as well as those equipped with E-ZPass transponders, would not receive the discount (hereinafter the "Resident Only Fast Lane Discount Program").

24. E-ZPass is an automated toll collecting system that operates in Delaware, New Jersey, New York, Pennsylvania, and a handful of other states. E-ZPass is interoperable with the MTA's FAST LANE automated toll collection system, but subscribers to E-ZPass do not get the discount offered in the Fast Lane Discount Program described herein.

25. On July 1, 2002, the MTA Resident Only Fast Lane Discount Program went into effect.

26. Immediately after the announcement of

the Resident Only Fast Lane Discount Program, concerns arose about the constitutionality of the Resident Only Fast Lane Discount Program. On July 3, 2002, the Boston Globe reported in an article titled, *Mass.-only Discount Not Legal, Some Say*, that the MTA's "plan to offer a discount only to state residents with FAST LANE transponders, touted as a way to offset the toll increases that took effect this week, may violate the interstate commerce clause of the U[nited] S[tates] Constitution."

27. On or about July 3, 2002, in an attempt to head off concerns that the Resident Only Fast Lane Discount Program may violate the interstate Commerce Clause of the United States Constitution, defendants modified the Resident Only Discount Program to apply to all travelers, residents and non-residents, equipped with FAST LANE transponders. As reported in the Boston Herald in an article titled, *Turnpike Extends Discount to Out-of-State Fast Lane Drivers*, the MTA announced that "its new toll discount program will include out-of-state drivers who purchase Fast Lane transponders." Further, according to defendant Matthew Amorello, the change would affect a few thousand drivers, mostly from Connecticut, and, purportedly, head off any concerns that the discount program might violate the interstate Commerce Clause of the United States Constitution.

28. Under the revised program, the discounts remained the same. However, to receive the discount one must participate in the MTA's FAST LANE program, drive a passenger car and purchase a FAST LANE transponder at a cost of $27.50. E-ZPass customers are not eligible for the discount. Also, non-residents, including plaintiffs and members of the class,

not equipped with a FAST LANE transponder do not receive the discount (hereinafter the "Fast Lane Discount Program").

29. On July 1, 2002, the revised Fast Lane Discount Program retroactively went into effect thereby replacing the Resident Only Fast Lane Discount Program.

30. Defendants Matthew Amorello, Jordan Levy and Christy Mihos were on the MTA board at the time the MTA enacted the Resident Only Fast Lane Discount Program and the modified Fast Lane Discount Program outlined above.

31. The Allston-Brighton and Route 128 toll plazas on Interstate 90 collect a toll in each direction of travel to and from the City of Boston. Under the Fast Lane Discount Program, a non-resident traveler, including plaintiffs and members of the class, are charged 25 cents more at each of these toll plazas to enter or leave the City of Boston than those equipped with FAST LANE transponders. Thus, a round-trip to and from the City of Boston charges a non-resident traveler who has not purchased a FAST LANE transponder using this route up to $1.00 (4 toll transactions times 25 cents) more than those equipped with FAST LANE transponders to use the same 12 mile section of road.

32. On July 4, 2002, plaintiff Doran passed through the Allston-Brighton and Route 128 toll plazas and paid the full undiscounted fare of $1.00 at each of the toll plazas. The Fast Lane Discount Program did not apply to these transactions.

33. On July 5, 2002, plaintiff Saunders passed through the Allston-Brighton and Route 128 toll plazas

and paid the full undiscounted fare of $1.00 at each of the toll plazas using her E-ZPass transponder. The Fast Lane Discount Program did not apply to these transactions.

34. The Commerce Clause of the United States Constitution Article I, § 8, cl. 3 prohibits the Commonwealth of Massachusetts and its agencies, including defendants, from discriminating against out-of-state residents through the use of non-uniform tariffs and taxes.

35. According to the *Massachusetts Travel Industry Report: 2002* prepared by the Massachusetts Office of Travel and Tourism in May of 2002, the Commonwealth of Massachusetts hosted 26.9 million domestic and international visitors in year 2000. Domestic visitors represented 92% or 24.8 million visitors, while International visitors represented 8% or 2.1 million international visitors of all visitors to Massachusetts in 2000. The majority or approximately 75% of visitors came to Massachusetts for leisure or pleasure purposes. Approximately 67% of the Massachusetts domestic visitors report driving a personal automobile and just over 20% fly. Of the total Massachusetts domestic visitors in 2000, Greater Boston, which includes Suffolk County, Norfolk County (excluding Cohasset), and 26 cities and towns in Middlesex County welcomed 10.6 million domestic visitors or 43%. Typical visitors to Greater Boston are most likely to come from one of five states: New York (14%), Massachusetts (8%), Connecticut (8%), California (8%), and New Jersey (8%). Because 67% of the Massachusetts domestic visitors drive from various parts of the country, including those visitors to Greater Boston area, many non-residents use Interstate 90 and

are subject to the relevant toll increases and do not participate in the MTA's FAST LANE program, including approximately 22% of the domestic visitors from New York and New Jersey where E-ZPass is the prevalent automated toll collection system.

36. By requiring that non-residents i) participate in the FAST LANE program, ii) establish an account, iii) prepay for tolls (depending on the selected prepayment option), iv) limit prepayment options to one bank (Fleet Bank, which is headquartered in Boston, Massachusetts), and v) purchase a FAST LANE transponder for $27.50 to obtain the discount, the Fast Lane Discount Program is unduly burdensome, improperly favors in-state interests, including Fleet Bank and the MTA's FAST LANE program, over out-of-state interests and improperly shifts costs to non-residents, taxi drivers and their non-resident passengers arriving from Logan International Airport, and other interstate non-resident commuters who do not participate in the MTA's FAST LANE program, including plaintiffs and members of the class, thereby discriminating against them in violation of the Commerce Clause and 42 U.S.C. § 1983.

**CLASS ACTION ALLEGATIONS**

37. Plaintiffs bring this cause of action individually and on behalf of all class members pursuant to 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure defined as follows:

> All non-resident interstate travelers who paid the full undiscounted fare or paid the discounted fare using a FAST LANE transponder at the Allston-Brighton,

Route 128, Ted Williams Tunnel, and/or Sumner Tunnel toll plazas from July 1, 2002 to the present.

38. Excluded from the class are the defendants, any parent, subsidiary, affiliate, or controlled person of defendants, as well as the officers, directors, agents, servants, or employees of defendants, and the immediate family members of any such persons.

39. This action meets all the requirements for class action certification in that:

a) The class is so numerous as to make joinder impracticable. Boston is a major metropolitan city, tourist destination and commuter commerce center to which thousands of non-resident interstate travelers arrive by car and air each day, thereby utilizing the toll plazas subject to the Fast Lane Discount Program. According to the *Massachusetts Travel Industry Report: 2002* prepared by the Massachusetts Office of Travel and Tourism in May of 2002, the Commonwealth of Massachusetts hosted 26.9 million domestic and international visitors. Domestic visitors represented 92% or 24.8 million visitors, while International visitors represented 8% or 2.1 million international visitors of all visitors to Massachusetts in 2000. The majority or approximately 75% of visitors came to Massachusetts for leisure or pleasure purposes. Approximately 67% of domestic visitors to Massachusetts report driving a personal automobile and just over 20% fly. Of the total Massachusetts domestic visitors in 2000, Greater Boston, which includes Suffolk County, Norfolk County (excluding Cohasset), and 26 cities and towns in Middlesex County welcomed 10.6 million domestic visitors or 43%. Typical

visitors to Greater Boston are most likely to come from one of five states: New York (14%), Massachusetts (8%), Connecticut (8%), California (8%), and New Jersey (8%). Because 67% of the Massachusetts domestic visitors drive from various parts of the country, including those visitors to Greater Boston area, many non-residents use Interstate 90 and are subject to the relevant toll increases and do not participate in the MTA's FAST LANE program. Finally, as of May 2000, the MTA had issued a total of 320,501 FAST LANE transponders and the daily number of FAST LANE transactions approximates 190,000. Upon information and belief, the vast majority of the FAST LANE transponders have been issued to Massachusetts' residents. The FAST LANE transactions represent only a fraction of the total daily transactions, including thousands of non-resident transactions, at the relevant toll plazas. Accordingly, each day thousands of non-resident interstate travelers without FAST LANE transponders pass through the Allston-Brighton, Route 128, Ted Williams Tunnel, and the Sumner Tunnel toll plazas with daily toll transactions numbering in the thousands;

b) There are questions of law or fact that are common to the class which predominate over any questions affecting only individual members. The common questions of law or fact include whether defendants: i) in enacting and administering the Fast Lane Discount Program, violated the interstate Commerce Clause of the United States Constitution Article I, § 8, cl. 3 which prohibits the Commonwealth of Massachusetts and its agencies, including defendants, from discriminating against out-of-state residents through the use of non-uniform tariffs and

taxes; ii) improperly charged non-resident travelers without FAST LANE transponders the full undiscounted toll; iii) violated plaintiffs' and members of the class' civil rights pursuant to the United States code, 42 U.S.C. § 1983; and iv) to what extent the members of the Class have sustained damages and the proper measure of such damages;

c) Plaintiffs' claims are typical of the claims of the members of the class because defendants overcharged plaintiffs for tolls in violation of their Constitutional rights. Defendants by enacting the Fast Lane Discount Program, acted consistently towards plaintiffs and all other members of the putative class. Further, plaintiffs' claims are typical because they and members of the class shared a common relationship with defendants as non-resident interstate travelers and were victims of defendants' unconstitutional practices. Thus, their claims and injuries, as well as those of the class, are based on the same legal theory and are linked to defendants' actions. Plaintiffs and all members of the class sustained damages as a result of the defendants' wrongful conduct alleged herein;

d) Plaintiffs are proper class representative who will fully and adequately protect the interests of the members of the class. Plaintiffs have retained competent counsel who has substantial experience and expertise in consumer and class action litigation. Plaintiffs have no interest antagonistic with, contrary to, or in conflict with the members of the class they seek to represent; and

e) A class action is superior to other available methods for the fair and efficient adjudication of this controversy, because joinder of all members of

the class is impracticable. Further, the prosecution of separate actions by individual members of the class would create a risk of inconsistent and varying adjudications concerning the subject of this action. Furthermore, as damages suffered by individual members of the class may be relatively small, the expense and burden of individual litigation may make it impossible for most members individually to redress the wrongs done to them. The likelihood of individual members of the class prosecuting separate claims is remote. No unusual difficulties are likely to be encountered in the management of this action as a class action.

**COUNT I**
**(Violation of the Commerce Clause Article I, § 8, cl. 3 of the United States Constitution and 42 U.S.C. Section 1983)**
**(Against all defendants in their official capacities)**

40. Plaintiffs repeat and reallege each of the allegations set forth in paragraphs 1 through 39 above as if fully set forth herein.

41. Defendants in their official capacities caused to be enacted and administered the Fast Lane Discount Program. These actions violated plaintiffs' rights under the Commerce Clause of the United States Constitution because the Fast Lane Discount Program imposes unnecessary and impermissible burdens on interstate commerce, thereby discriminating against out-of-state commerce and violating 42 U.S.C. § 1983.

42. The Fast Lane Discount Program regulates an aspect of interstate travel that by its unique nature demands cohesive national treatment and is, therefore, offensive to the Commerce Clause.

The program also subjects interstate commerce to inconsistent regulations by placing burdens on non-resident travelers that exceed any local benefit that allegedly may be derived from it.

43. Defendants, acting under color of law, institute, authorize, ratify, permit and acquiesce in the enactment and enforcement of the Fast Lane Discount Program which violates plaintiffs' fundamental rights, including plaintiffs' right to interstate travel.

44. As a direct and proximate result of defendants' violation of plaintiffs' and class members' Constitutional rights, plaintiffs and the members of the class have sustained ascertainable damages related to the collection of the undiscounted tolls and/or costs of the FAST LANE program in an amount to be determined at trial plus their reasonable attorney's fees and costs.

WHEREFORE, the plaintiffs, on their own behalf and on behalf of the members of the Class, pray for judgment as follows:

A. Declaring this action to be a class action properly maintained pursuant to Rule 23(a), (b)(2) and (b)(3) of the Federal Rules of Civil Procedure;

B. Declaring the Fast Lane Discount Program to be unconstitutional;

C. Enjoining the defendants from enforcing the Fast Lane Discount Program;

D. Awarding damages to the plaintiffs and the members of the Class, with prejudgment interest;

E. Awarding the plaintiffs and the members of the class their costs and expenses of this litigation,

including reasonable attorneys' fees, experts' fees and other costs and disbursements; and

F. Awarding the plaintiffs and the members of the class such other and further relief as may be just and proper under the circumstances.

PLAINTIFFS DEMAND A TRIAL BY JURY.

Dated: _____

Submitted by the attorney for the Plaintiffs and the Class,

_____

Stephen V. Saia, BBO No. 562009
Law Offices of Stephen V. Saia
70 Old Cart Path Lane
Pembroke, MA 02359
(781) 826-8401

**CERTIFICATE OF SERVICE**

I, Stephen V. Saia, counsel for plaintiffs hereby certify that on July _____, 2002, I mailed a copy of the above document to the Massachusetts Office of the Attorney General and each of the named defendants at the Massachusetts Turnpike Authority by certified mail return receipt requested.

_____

Stephen V. Saia

**Appendix E**

**Massachusetts General Laws**
**(Excerpts)**

*Orders of the Day*

"SECTION 26A. (A) Section 3 of Chapter 81A of the General Laws, as appearing in the 2000 Official Edition, is hereby amended by inserting after the definition of 'central artery north area' the following 2 definitions: -

'Frequent user', a motorist who completes a roundtrip transit over any portion of the metropolitan highway system or of the turnpike ay 80 days within a calendar year and participates in the FastLane program.

'Frequent user toll discount program', the program whereby, following an increase in toll rates from the rate in place on January 1, 2002, all frequent users shall receive a credit to their FastLane account in an amount not less than 50 per cent of the rate increase for each toll paid at that increased rate.

(B) Section 4 of said chapter 81A, as so appearing, is hereby amended by inserting the word 'turnpike;', in line 35, the following words: - 'provided, that the tolls shall be fixed at the rate in pace as of January 1, 2002 until the implementation of the frequent user toll discount program';

(C) Said section 4 of said chapter 81A, as so appearing, is hereby amended by inserting after the word 'system;', in line 45, the following words: - 'provided, that the tolls shall be fixed at the rate in place as of

January 1, 2002 until the implementation of the frequent user toll discount program;'

(D) Subsection (a) of section 10 of said chapter 81A, as so appearing, is hereby amended by inserting after the first sentence the following sentence: - 'The authority shall implement the frequent user toll discount program.'"

After remarks, the amendment was adopted.

**Chapter 246 of the Acts of 2002, *An act Providing for Certain Transportation Improvements.***

*Whereas* , The deferred operation of this act would tend to defeat its purpose, which is to provide for a program of capital transportation development and improvements in the commonwealth, therefore it is hereby declared to be an emergency law, necessary for the immediate preservation of the public convenience.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

**SECTION 44.** There is hereby established an advisory committee consisting of 6 persons to be appointed by the governor, 4 persons appointed by the president of the senate with at least 1 such person to be a member of the minority party, 4 persons appointed by the speaker of the house of representatives, with at least 1 such person to be a member of the minority party, 1 person appointed by the chief executive officer of Massachusetts Turnpike Authority and 1 person appointed by the chief executive officer of the Massachusetts Port Authority for the purpose of studying and making recommendations relative to future proposals and actions to finance the obligations of the Massachusetts Turnpike Authority, the metropolitan highway system, the Massachusetts Port Authority and the Central Artery/Third Harbor Tunnel Project.

The study shall examine the equity of the funding

structure with regard to financing the obligations of the Massachusetts Turnpike Authority, the Metropolitan highway system, the Massachusetts Port Authority and the Central Artery/Third Harbor Tunnel Project and shall include, but not be limited to, an examination of the following: (1) the fairness of the proposed toll structure for private passenger vehicles using interstate highway route 90 relative to private passenger vehicles using the other highways of the commonwealth and to benefit from the intended use of the Central Artery/Third Harbor Tunnel Project; (2) the effect and practicality of instituting tolls on the commonwealth's border with neighboring states, including on the commonwealth's border with the state of New Hampshire on the interstate highway routes 93 and 95 and state highway route 3; (3) the effect of providing for a more uniform and consistent toll structure on highways throughout the commonwealth, including the effect of instituting tolls on that portion of the metropolitan highway system, as defined in chapter 81A of the General Laws, presently consisting of interstate highway route 93; (4) the effect of reinstituting tolls on the Boston Extension at the interchange of interstate highway routes 90 and 93 and on the turnpike from exit 1 at the commonwealth's border with the state of New York to, but excluding, exit 6, at the interchange of interstate highway Route 90 and interstate highway route 291; (5) the effect of modifying toll discounts or free travel on the turnpike, roadways within the metropolitan highway system and Tobin Bridge including consideration of frequent user and commuter discount; (6) the effect of limiting or eliminating contributions by the Massachusetts Turnpike Authority to the surface artery; (7) the effect of excluding from the metropolitan highway system

that portion constituting a section of interstate highway route 93; (8) the effect of transferring to the department of highways such portion of the turnpike extending from the commonwealth's border with the state of New York to, but excluding, exit 6 at the interchange of interstate highway route 90 and intestate highway route 291; (9) the effect of redefining the metropolitan highway system to include such portion of the turnpike extending from the interchange of interstate highway route 90 to and excluding the interchange of interstate highway route 90 and interstate highway route 495; (10) funding sources for the department of highways to meet the expenses of operating such portion of interstate highway route and other highway transferred to the department of highways from the Massachusetts Turnpike Authority; (11) the effect of providing a tax credit to Massachusetts residents purchasing transponders for use on the turnpike or the metropolitan highway system; (12) the effect of permitting turnpike revenues in excess of those needed to pay operating expenses and debt service on bonds supported by turnpike revenues available to be pledged and pay debt service on bonds issued for the metropolitan highway system; (13) the elimination of the Local Tourism Grant Program of the Massachusetts Turnpike Authority; (14) the effect of limiting certain liabilities of the Massachusetts Turnpike Authority, including the extent to which the provisions of chapter 258 of the General Laws should also be applicable to the Massachusetts Turnpike Authority; (15) further cost savings that might be realized by the Massachusetts Turnpike Authority; (16) the effect and practicality of dedication of a portion of the vehicle registration fee under clause 2 of section 33 of chapter 90 of the General

Laws and a portion of the fee for a license to operate motor vehicles under clause 21 of said section 33 of said chapter 90 to offset proposed or actual toll increases on interstate highway route 90; (17) the effect and practicality of dedicating all or a portion of all taxes collected on fuel sold on property owned or leased by the Massachusetts Turnpike Authority to offset the proposed or actual toll increase on interstate highway route 90; and (18) the feasibility of the Massachusetts Turnpike Authority instituting a size limitation of 80 square feet in area, excluding supports, and a height restriction of 30 feet from the ground for signs advertising any gasoline station, restaurant or other service erected or maintained on the turnpike and the feasibility of eliminating existing signs that do not meet such limitations or prohibiting the illumination of existing signs that do not meet such limitations between the hours of 10:00 p.m. and 6:00 a.m.

No member of the advisory board shall receive compensation for his services nor shall a member of the advisory committee be reimbursed for travel expenses or actual expenses incurred in carrying out his duties as a member of the advisory committee. The advisory committee shall report to the joint committee on transportation the results of its study, together with its recommendations and drafts of any legislation necessary to carry those recommendations into effect, not later than January 1, 2003. The Massachusetts Turnpike Authority and the Massachusetts Port Authority shall not implement any adjustment in tolls imposed on 2 axle passenger, noncommercial vehicles at least until 90 days after the submission of the report.

**SECTION 45.** The Massachusetts Turnpike Authority

is hereby authorized and directed to provide for the continued operation of the fifty-percent toll discount program for account holders who participate in the authority's electronic toll collection system, as approved by the board of directors in open meeting on June 28, 2002. The authority shall appropriate the funds necessary to provide said discount on a permanent basis.

**SECTION 46.** The Massachusetts Turnpike Authority shall establish and convene within 30 days of the effective date of this act a task force to determine the effect that the Massachusetts Turnpike and its new toll increases shall have for neighborhoods in the vicinity of Exits 16 and 17 on the Massachusetts Turnpike in the city of Newton, specifically, the areas known as Newton Corner, Nonantum, Newtonville, West Newton, Auburndale, Newton Lower Falls and Waban. Said task force shall also study the continuing problem of noise from the turnpike for neighborhoods abutting the turnpike throughout the city of Newton. Said task force shall consist of 5 members: 1 shall be appointed by the Massachusetts Turnpike Authority; 1 shall be appointed by the Massachusetts highway department; 1 shall be appointed by the executive office of environmental affairs; 2 shall be appointed by the mayor of the city of Newton. Said study shall include, but not be limited to, any issues concerning traffic, pedestrian access and safety, parking, pollution and noise in the city of Newton related to its proximity to the Massachusetts Turnpike. Said task force shall conduct at least 1 public hearing in the city of Newton. The task force shall make recommendations, including but not limited to mitigating the noise, traffic and safety problems stemming from proximity to the

Massachusetts turnpike of the neighborhoods of the city of Newton. The cost of implementing any such recommendations shall be the responsibility of the Turnpike Authority. Nothing herein shall in any way limit the city of Newton's authority to approve any changes to its public roadways. Said task force shall submit its findings and recommendations to the house and senate chairs of the general court's joint committee on transportation, and to the city of Newton, no later than January 1, 2003. The Massachusetts Turnpike Authority shall not institute tolls at Exit 16 or 17 prior to the conclusion of this study and without further analysis of the impact of such institution on the problems aforementioned.

**SECTION 57.** The Massachusetts Port Authority shall conduct a feasibility study of implementing a 50 cent toll discount for participants in the FAST LANE program, so called, on the Maurice J. Tobin Memorial Bridge; provided further, that as part of said study the Massachusetts Port Authority shall hold a public hearing the time and location of which shall be determined by the Authority; provided however, that such public hearing be held within 45 days after the effective date of this act; provided further, that such public hearing be held in one of the following communities: Chelsea, Everett, Lynn, Malden, Melrose, Revere, Saugus or Winthrop, and; provided further, that comments from such public hearing be addressed by the Authority and its responses incorporated into the feasibility study authorized in this section.

Said Authority shall provide a report of its findings, including responses to public comments, to the Speaker of the House of Representatives, President of the

Senate, Chairman of the House Committee on Ways and Means, Chairman of the Senate Committee on Ways and Means, Chairman of the Joint Committee on Transportation, Clerk of the House of Representatives and Clerk of the Senate 60 days after the effective date of this act.

**Senate Bill, No. 1772, *An Act Relative to Sale of Gasoline on the Massachusetts Turnpike***

SECTION 1. Section 7 of Chapter 64A of the 2000 Official Edition of the General Laws is hereby amended by inserting the following section:-

"Section 7B. All Revenues from the taxes per gallon collected on fuel sold on property owned or leased by the Massachusetts Turnpike Authority shall be dedicated to the Massachusetts Turnpike Authority for the purpose of paying for the permanent fifty-percent toll discount program approved by the board of directors in open meeting on June 28, 2002."

**Appendix F**

**Massachusetts Travel Industry Report:**
**2002**
**Statewide & Regional**
**Economic Impact and Visitor Behavior**
**(Excerpts)**

In 2000, Massachusetts hosted 24.8 million domestic person trips, including both leisure and business travel, 2.4% of all domestic travel within the U.S. This is a 4.1% increase from 1999. The majority of domestic travel to Massachusetts occurs during the summer months of June, July, and August. The autumn season hosts the second greatest number of visitors, followed by spring, and lastly winter.

Domestic visitors come from across the U.S. to visit Massachusetts, but residents of Massachusetts also take advantage of the travel experiences offered in Massachusetts. Residents of Massachusetts represented 20% of all travel, over 5 million persontrips, in the Commonwealth in 2000.

**REGIONAL VISITATION**
Greater Boston is the most popular destination for Massachusetts visitors, hosting 43% of all domestic travel in Massachusetts (p. 15).

**Domestic Travel by Season**
24,836,000

| | |
|---|---|
| 62% | Summer |
| 16% | Fall |
| 12% | Winter |
| 10% | Spring |

1999 Domestic Person Trips to Massachusetts: 23,867,000

Fellow New England residents also recognize the unique travel opportunities available in Massachusetts. Residents of New England, including Massachusetts, represented half of all domestic travel, 12.6 million person-trips, to the Bay State in 2000.

Also a popular destination for residents of the mid-Atlantic, Massachusetts hosted 6 million person-trips by residents of the Mid-Atlantic states, representing 24% of all person-trips to Massachusetts in 2000.

**Top 10 States of Origin**

| Share of all Massachusetts Persontrips | Number of Persontrips | State of Origin |
|---|---|---|
| 2.9% | 721,000 | Vermont |
| 2.6% | 637,000 | Rhode Island |
| 3.6% | 906,000 | Pennsylvania |
| 3.9% | 966,000 | California |
| 4.0% | 988,000 | Maine |
| 5.3% | 1,322,000 | New Jersey |
| 5.8% | 1,453,000 | New Hampshire |
| 15.1% | 3,738,000 | New York |
| 15.2% | 3,767,000 | Connecticut |
| 20.2% | 5,027,000 | Massachusetts |

The majority of domestic visitors drive a personal automobile to their Massachusetts destination (67%). About one in five fly (22%).

**Primary Mode of Transportation**

| | |
|---|---|
| 1.7% | Other |
| 0.8% | Ship/Boat |
| 1.3% | Train |
| 1.7% | Camper/RV |
| 2.7% | Bus |
| 2.7% | Rental Car |
| 21.8% | Airplane |
| 67.3% | Auto/Truck |

Greater Boston welcomed an estimated 10.6 million domestic visitors in 2000. They hosted 43% of all domestic person-trips to Massachusetts.1

*The Typical Trip1

Visitors to Greater Boston are most likely to come from one of five states: New York (14%), Massachusetts (8%), Connecticut (8%), California (8%), and New Jersey (8%). Most who visit Greater Boston are on a leisure trip. The most frequently reported primary trip purpose is visiting with friends/relatives (40%). Additionally, Greater Boston hosts many business travelers; 26% report business as their primary trip purpose, 5% report combined business/pleasure, and 4% report attending a conference or seminar.

The most frequently reported trip activities are shopping (30%) and visiting historical places and museums (28%). Visitors also report attending cultural events and festivals (13%), nightlife/dancing (7%), visiting state/national parks (6%), and attending sports events (6%). The majority of visitors who stay overnight report lodging in a hotel, motel, or bed-and breakfast (78%). Thirty-seven percent report lodging in a private home.

The most frequently reported primary mode of transportation is flying (45%), followed by personal automobile (44%). Many travelers opt for using a rental car (4%), bus (3%), or train (2%).

The most frequently reported primary trip purpose is visiting with friends/relatives (40%). Additionally, Greater Boston hosts many business travelers; 26%

report business as their primary trip purpose, 5% report combined business/pleasure, and 4% report attending a conference or seminar. Greater Boston welcomed an estimated 10.6 million domestic visitors in 2000. They hosted 43% of all domestic person-trips to Massachusetts.